Message

From: Dunn, Alexandra [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=426D0177EAAB4001A5C85F051565997E-DUNN, ALEXA]
Sent: 9/14/2018 1:16:14 PM
To: Bender, Emily [Bender.Emily@epa.gov]; Gutro, Doug [Gutro.Doug@epa.gov]
Subject: Re: Friday, September 14, 2018- INSIDE EPA NEWSCLIPS

Doug has an article from Bloomberg that did not get picked up. Off to the Register.

Sent from my iPhone

Alexandra Dapolito Dunn, J.D.
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On Sep 14, 2018, at 7:51 AM, Bender, Emily <Bender.Emily@epa.gov> wrote:

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REJECTING INDUSTRY PLEA, EPA LISTS FIRST NPL SITES DUE TO VAPOR INTRUSION

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AMID SENATE TALKS, STATES RENEW OPPOSITION TO CWA SECTION 401 BILL

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ORD, LACKING RULE EXPERTISE, LEADS ON SCIENCE PLAN, PROMPTING DOUBTS

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EPA has assigned its Office of Research and Development (ORD), an office with little rulemaking experience, to take the lead in rewriting...

REJECTING INDUSTRY PLEA, EPA LISTS FIRST NPL SITES DUE TO VAPOR INTRUSION

Inside EPA | 09/13/2018

EPA for the first time has listed contaminated sites to Superfund's National Priorities List (NPL) due to vapor intrusion, rejecting industry's opposition to listing one of the sites for fear it would set an adverse precedent by sidestepping the protocol for evaluating vapor intrusion sites.

The agency Sept. 11 announced it is finalizing the listing of Rockwell International Wheel & Trim site in Grenada, MS, and Delfasco Forge site in Grand Prairie, TX, on the NPL, marking the first time the agency has listed sites due to subsurface intrusion (SsI). Relevant documents are available on InsideEPA.com. (Doc. ID: 215066)

SsI can take the form of either contaminated vapor or water intrusion, though vapor intrusion (VI) is more common and occurs when contaminated vapors rise from below ground into buildings through dirt floors, utility line openings or other pathways. An Obama-era ***EPA*** rule that went into effect in 2017 added SsI as a component to the Hazard Ranking System (HRS) -- used to score whether a contaminated property qualifies for the NPL. The addition means NPL listings can be made based on SsI as a pathway for exposure.

EPA's decision to list the Rockwell site comes in defiance of industry arguments against such a move, with the National Association of Manufacturers (NAM) fearing it would set a "very concerning precedent for other sites around the country."

One industry lawyer notes industry has opposed NPL listings based solely on vapor intrusion. The source sees the move by Acting ***EPA*** Administrator Andrew Wheeler and Steven Cook, currently the highest ranking political appointee in ***EPA***'s waste office, as likely following former ***EPA*** Administrator's Scott Pruitt's approach on Superfund.

The source says this approach is to "focus on the populist response, show that you can be anti-industry." The comments refer to Pruitt's tougher approach to Superfund cleanup decisions during his tenure compared to his broader deregulatory efforts he pursued in other programs.

The source adds, "I suppose their thought is that you can pile on cleanup costs on industry, but they're so happy with the roll-back on air regulations, they won't care."

While the Delfasco Forge proposed listing drew no comments earlier this year, the proposed listing of the

Rockwell site drew many, including opposition from NAM and the property's operator. NAM and the operator, Ice Industries, Inc., fear the precedent that will be set relates to ***EPA***'s alleged failure to comply with provisions of the HRS Ssl rule that require the agency to consider the benefits of existing mitigation systems when scoring a site for possible listing on the NPL based solely on Ssl.

The 2017 rule "requires consideration of permanent vapor mitigation systems like the [sub-slab depressurization system (SSDS) applied at the Rockwell site] in scoring sites for consideration on the NPL," Ross Eisenberg, NAM's vice president for energy and resources policy, said in March 26 comments.

But the record shows ***EPA*** failed to follow this protocol, he says, and instead required the SSDS "to be shut off until after the Agency made its decision to list the site on the NPL."

EPA is basing its listing of the Rockwell site on the property's HRS score due to vapor intrusion, according to the proposed listing. The HRS record for the proposed site says 217 people work in the main building on the Rockwell site in an area where the indoor air has elevated levels of volatile organic compounds (VOCs).

The agency says TCE vapors from beneath the operating manufacturing building are passing into the building through cracks, joints and other openings in the concrete floor, contaminating the building's indoor air. The chemical vapors entering the building may pose a risk to human health, according to the HRS record. It says the contamination stems from past operations there.

EPA is listing the Delfasco Forge site due to vapor intrusion of VOCs into residential properties adjacent to a former munitions manufacturing and forge operations facility. ***EPA*** used its Superfund removal program and funds from a bankruptcy settlement with the owners of the forge to install some vapor mitigation systems, according to an ***EPA*** fact sheet on the site's proposed listing in May.

But the state of Texas sought a listing because the site now lacks any viable options, other than federal funding from the Superfund program, for long-term remediation as the bankruptcy funds have run out, according to the fact sheet.

One environmental source calls it a "good thing that SSI/VI sites are finally being added," but adds, "I don't expect a deluge because it appears that most serious SSI sites have already qualified for NPL based on other pathways." The source adds that sites with minor levels of subsurface intrusion can be addressed through the Resource Conservation & Recovery Act and state authorities.

The two sites are among five ***EPA*** announced Sept. 11 that it is finalizing as NPL sites, in addition to six others it is proposing to add to the NPL.

"Adding these sites to the proposed and final National Priorities List signifies ***EPA***'s commitment to clean up these contaminated lands and return them to safe and productive use," Wheeler says in the press release announcing the listings.

The three other sites named to the NPL are: Southside Chattanooga Lead, Chattanooga, TN; Broadway Street Corridor Groundwater Contamination, Anderson, IN; and Donnelsville Contaminated Aquifer, Donnelsville, OH, according to ***EPA***.

The six sites proposed to the NPL are: Magna Metals, Cortland Manor, NY; Shaffer Equipment/Arbuckle Creek Area, Minden, WV; Cliff Drive Groundwater Contamination, Logansport, IN; McLouth Steel Corp., Trenton, MI; Sporlan Valve Plant #1, Washington, MO; and Copper Bluff Mine, Hoopa, CA.

EPA's decision to propose the Shaffer site in Minden, WV, appears to be a win for community representatives, who during Pruitt's tenure gained new access to ***EPA*** headquarters officials on Superfund remediation issues, including at the Minden site. The orphan removal site had, until last year, been given little attention since ***EPA*** completed a removal action involving soil excavation and a cap over one acre of the site in 2002.

But the site earned attention from then-Superfund reforms chief Albert Kelly last year after citizens raised concerns over a sewer line replacement that was to traverse land still contaminated with polychlorinated biphenyls (PCBs). One citizen activist source said Kelly stepped in and was able to stop the sewer line.

Kelly left the agency this past spring, after congressional criticisms over his appointment, given his lifetime ban from banking activities imposed by the Federal Deposit Insurance Corporation.

At the site, ***EPA*** previously had recovered some PCBs, but had never assessed the entire area, the citizen source says. But the agency last year launched a new round of sampling for PCBs and dioxin in response to

residents' concerns. The site was used to manufacture equipment for mining, including transformers and other electrical equipment containing PCBs, ***EPA*** says.

EPA, however, at least for now is not listing the 35th Avenue ***Superfund site***, in Birmingham, AL, on the NPL, despite recent pleas from both the Birmingham mayor and Sen. Doug Jones (D-AL). Mayor Randall Woodfin last month urged Wheeler to consider an immediate listing, citing its high hazard ranking score as well as the recent convictions of industry officials on bribery and other charges for their role in seeking to keep the site off the NPL. -- Suzanne Yohannan

EPA ALIGNS REGIONS WITH HEADQUARTERS, BUT SOME FEAR 'MEGA-DISTRACTION'

Inside EPA | 09/13/2018

Acting ***EPA*** Administrator Andrew Wheeler is reorganizing the agency's regional offices to more closely mirror headquarters' structure and improve coordination, part of the Trump administration's efforts to improve efficiency across the government, though an agency source says the move glosses over regional differences and is "a mega-distraction."

In a Sept. 6 email to ***EPA*** staff titled "Regional Realignment," Wheeler announces the restructuring that divides each of the 10 regional offices into eight divisions, a design similar to agency headquarters. Relevant document are available on InsideEPA.com. (Doc. ID: 214977)

Divisions include, Air and Radiation, Enforcement and Compliance Assurance, Water, and Superfund and Emergency Management, among others, according to a diagram attached to the email.

"When the regional offices are organizationally aligned with headquarters, we will be better able to streamline decision-making for accountability and performance, allowing us to better carry out our mission," Wheeler says.

"The contributions of ***EPA***'s regional office employees, who constitute nearly half of the agency's workforce, are vital to the protection of human health and the environment."

In the email, Wheeler says the reorganization will bring benefits, improving consistent implementation of ***EPA*** rules, including increasing coordination between headquarters and regions, allowing for better resource allocation and boosting transparency for ***EPA***'s customers.

The reorganization is the latest in a series of steps that ***EPA*** is taking under its February 2018 Reform Plan issued in response to President Donald Trump's Executive Order 13781, issued in March 2017, that set a "Comprehensive Plan for Reorganizing the Executive Branch."

Wheeler's email says that the agency's Reform Plan includes 11 tasks, including an examination of the agency's field presence, and that the regional reorganization grew out of that field presence analysis.

"After reviewing information presented by the Field Presence workgroup, Chief of Operations Henry Darwin and the Regional Administrators, in consultation with the Assistant Administrators, concluded that greater consistency in ***EPA***'s regional organizational structure is needed to increase visibility into regional office operations."

The reorganization is also one of a variety of efforts that Darwin is leading to improve efficiency at the agency, including a plan to streamline regions' reviews of state programs.

While states support the greater independence the changes may bring to their implementation of federal environmental law, they fear that more uniformity in ***EPA***'s approach may hamper existing flexibilities they enjoy with ***EPA*** regional officials.

An ***EPA*** source is raising similar concerns in response to Wheeler's regional reorganization. The source argues that the uniform structure contrasts with regions differing responsibilities, noting vast discrepancies in the number of tribes states work with as one example. For example, Region 9, which includes California, Nevada, Arizona and Hawaii, collaborates with nearly 150 tribes, while eastern regions' have far fewer.

The source also says the reorganization will likely prove a "mega-disruption and a mega-distraction," arguing that the change will divert employees from the agency's core work.

Reorganizations "typically involve a massive drain of resources towards the development of" organization definitions, choosing who takes what spot, and negotiating with unions, among other tasks, the source says.

The reorganization is one of a variety of efforts that Darwin is leading to improve agency efficiency, including several that focus on regional operations. In April, ***EPA*** headquarters officials reviewed Region 7's permitting, inspection and other programs as part of an agency-wide effort to use "Lean" management system to streamline activities.

The region that covers Nebraska, Iowa, Kansas and Missouri, was the first to undergo the process reviews that businesses use to better serve their customers and that are planned for all the agency's regional offices.

And Wheeler is expected to soon release a new policy to streamline regional reviews of states' federally-delegated environmental programs, which is expected to make reviews more consistent from region to region.

Darwin has told Inside ***EPA*** that the policy will outline principles to guide ***EPA*** regional officials' work with states in several areas, such as conducting retrospective reviews of state environmental programs and reviewing specific permitting and enforcement actions where necessary. It will also guide other state-***EPA*** interactions.

The policy calls for defining an appropriate level of deference for state decision-making, clearly communicating with states prior to reviews, clarifying the standard of review as defined in a specific statute or policy, and defining a process for elevating disputes from staff to supervisors to ensure prompt resolution of disagreements.

The audit policy responds to calls from the Environmental Council of the States (ECOS) for ***EPA*** to conduct retrospective reviews of state programs wherever possible, rather than reworking specific decisions, and for a consistent review process.

But state regulators also have raised concerns that any audit policy not limit existing flexibilities or undermine ***EPA***'s role as a strong arbiter of disputes over cross-state air pollution.

For example, ECOS Director Sam Sankar told Inside ***EPA*** in July that states generally appreciate ***EPA***'s plan to streamline agency reviews of state programs but that any policy should be sufficiently flexible to not alter cooperation between states and regions where those relationships are strong.

Environmentalists, who have faulted some state programs as inadequate, fear that streamlining the ***EPA*** reviews will weaken environmental protections, especially in states where industry has significant political influence. -- Dave Reynolds, Maria Hegstad & Suzanne Yohannan

2ND CIRCUIT URGED TO 'CLARIFY' DECISION UPHOLDING EPA COOLING WATER RULE

Inside EPA | 09/13/2018

Environmentalists are asking a federal appeals court for "clarification" on its decision upholding the Obama ***EPA***'s Clean Water Act (CWA) permit rule for cooling water intake structures, either to rehear the case or specify whether the rule's procedures for ***EPA*** to consult with wildlife services on the permits' species impacts are legally binding.

A Sept. 6 petition filed by environmental groups in Cooling Water Intake Structure (CWISC), et al., v. ***EPA***, et al., seeks either "clarification" of the panel ruling from the U.S. Court of Appeals for the 2nd Circuit that backs the cooling water policy, or rehearing of the case either by the same panel or the 2nd Circuit sitting en banc. The petition is available on InsideEPA.com. (Doc. ID: 214984)

Specifically, the 20 environmental group petitioners in CWISC are calling on the 2nd Circuit to hold that every part of the cooling water rule's "technical assistance process" (TAP) is binding on ***EPA***, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

TAP is the procedure for the services recommend permit modifications in order to avoid harms to species listed under the Endangered Species Act (ESA), and environmentalists want the court to say regulators would be legally required to follow those recommendations.

The 2nd Circuit's July 23 decision held the consultation process to be mandatory, which was the basis for rejecting environmentalists' arguments that the rule unlawfully allowed ***EPA*** to ignore the services' input.

But the environmental groups say in their petition that the ruling does not clearly address portions of the TAP procedure that were labeled as discretionary either in the services' biological opinion (BiOp) weighing in on the permit rule, or the regulatory text itself.

"If these actions are not mandatory, the TAP does not meet the requirements of [ESA] Section 7(a)(2) to insure no jeopardy or adverse modification of critical habitat, and this Court's holding on that point should be reconsidered because it misapprehends or overlooks the applicable law," the petition says.

Among the steps the environmentalists say the 2nd Circuit should clearly state are mandatory are the Corps' duty to recommend changes to permits "as is necessary to avoid jeopardy or adverse modification" to critical habitat -- which they say is on a list of "discretionary actions" in the BiOp -- and ***EPA***'s duty to formally object to state-issued permits that do not satisfy the services' recommendations, and then assume federal control over such permits as necessary.

"It is not enough that the Services' duties are mandatory; if ***EPA***'s duties to object and federalize are not also mandatory and reasonably certain to occur, then section 7(a)(2) has not been satisfied," the petition says.

It concludes that if the 2nd Circuit actually meant to give ***EPA*** and the services discretion on whether to take those steps, then it will ask for a full rehearing of the case.

"If the Court did not mean to hold, for example, that the Services must make recommendations to the Directors to avoid jeopardy, or that ***EPA*** must object to permits that do not incorporate the Services' recommendations, the Opinion should be reconsidered and the consultation found arbitrary, capricious, and contrary to" the ESA, the petition says.

The groups warn that without a clearer mandate for ***EPA*** and the services, litigation over individual permits will have to grapple with the binding nature of the TAP -- with the potential for "conflicting" decisions that appellate courts will have to resolve.

"Environmental Petitioners understand the Court to have held that the TAP, including the otherwise discretionary actions it specifies, is mandatory in its entirety, but others may take the position that certain procedures remain discretionary with the Services and that ***EPA***'s role in objecting to and federalizing permits remains discretionary. Such disputes might be replicated throughout the country given the number of facilities involved nationwide and the potential for conflicting opinions from the district courts," the groups say. -- David LaRoss

CASAC URGES GREATER AMMONIA FOCUS IN EPA NOX-SOX-PM NAAQS REVIEW

Inside EPA | 09/13/2018

EPA science advisers are reiterating calls for the agency to boost its focus on the environmental effects of ammonia air pollution as part of an ongoing review of the "secondary" environment-based ambient air limits for nitrogen oxides (NOx), sulfur oxides (SOx) and particulate matter (PM) due to concerns about ammonia's adverse impacts.

During a Sept. 5 Clean Air Scientific Advisory Committee (CASAC) meeting in Durham, NC, panelist and air quality consultant Praveen Amar said, "You have to treat ammonia with respect," calling for more analysis of future ammonia emissions trends, and on concentrated animal feeding operations, which are large emitters of ammonia. Ammonia emissions are increasing, while emissions of SOx and NOx are trending down, he noted.

Several panelists during the meeting also suggested a need for ***EPA***'s review to focus on ammonia's effects in a section on "gas-phase phytotoxic effects," examining toxicity of NOx, SOx and PM to plants.

The panel met to consider the agency's draft integrated science assessment (ISA) that synthesizes the scientific data newly available since the last NOx-SOx secondary national ambient air quality standards (NAAQS) review, which concluded in 2012. Although the agency considers the effects of reduced nitrogen in its ISA, it does not consider direct phytotoxic effects of ammonia in the document, ***EPA*** staff said at the meeting.

Secondary NAAQS are intended to protect the environment, unlike primary standards that are designed to protect public health, but ***EPA*** has to date declined environmentalists' calls to establish an ammonia NAAQS.

The ISA considers NOx, SOx and PM secondary standards together for the first time, after the agency in a prior review considered only the combined effects of NOx and SOx. In the 2012 review, ***EPA*** staff, supported by CASAC, suggested that the agency shift toward a novel NAAQS based on deposition of air pollutants in waterbodies, rather than concentration of the pollutants in ambient air. But then-Obama ***EPA*** Administrator Lisa Jackson decided there was still too much uncertainty associated with the new approach to implement it.

CASAC in reviewing the first draft NOx-SOx-PM ISA for the current NAAQS review, released in March 2017, recommended a greater focus on the adverse environmental effect of ammonia and nitrogen in general.

EPA in the second draft released in June responded with more focus on ammonia, and also reacted to CASAC

criticism of the document's organization by creating a more streamlined summary section, supported by a series of appendices detailing scientific evidence.

The second draft contains "no change in the main scientific conclusions" from the first draft, which examined whether there are "causal" linkages between the three pollutants at issue and various forms of ecological harm, ***EPA*** staff said.

Panelist Donna Kenski, an air quality expert with the Lake Michigan Air Directors' Consortium (LADCO), noted that in several instances, ***EPA*** indeed finds such causal relationships exist, and she argued that environmental effects are occurring at current levels of air pollution.

In the draft ISA, for example, ***EPA*** concludes that deposition of nitrogen and sulfur causes a range of adverse impacts, including reduction in the productivity and biodiversity of various aquatic and terrestrial ecosystems. However, these are broadly similar conclusions to those of the prior ISA for secondary NOx and SOx prepared for the 2012 review.

"Clearly the current standard is inadequate," Kenski said, although it was unclear which NAAQS she was referring to. Kenski said there is "voluminous evidence" for impacts of the three pollutants on public welfare, yet ***EPA*** has omitted explicit statements regarding the adequacy of NAAQS from the ISA, she said.

EPA staff on the call responded that although "there are effects at current levels" of pollution, the actual determination over whether that is adverse is in the hands of Acting Administrator Andrew Wheeler.

EPA staff on the call said that the new ISA structure will provide a template for ISAs in other NAAQS reviews. The Trump administration has set itself a goal of completing reviews for primary NAAQS for ozone by October 2020, and for PM by the end of 2020.

EPA last updated the ozone standard in 2015 by setting it at 70 parts per billion (ppb).

Current secondary PM limits, set in 2012, stand at 15 micrograms per cubic meter (ug/m3) annually or 35 ug/m3 over 24 hours for fine PM, and 150 ug/m3 over 24 hours for the larger "coarse" PM, or PM10.

EPA reviewed the secondary NAAQS for NOx in 2012, retaining the annual limit of 53 parts per billion (ppb) first set in 1971. The agency reviewed the SOx secondary standard in 2012 and retained the 50 ppb limit over three hours also set in 1971.

"This is an important transition point," said one ***EPA*** staffer on the call. "We are using this as a model" for the ozone review, the staffer said of the ISA for the NOx-SOx-PM review. "You will see that model as we are drafting the ozone assessment."

EPA staff during the meeting noted that the agency will be "facing a rather challenging time" completing these NAAQS reviews, as the same staff are working on the primary standards as on the secondary NOx-SOx-PM review.

Former ***EPA*** administrator Scott Pruitt outlined a streamlined NAAQS review process that could collapse several existing steps in the reviews into fewer steps, but so far the secondary NAAQS review is proceeding according to the traditional, time-consuming process followed by the Obama ***EPA***.

EPA plans to issue a quantitative risk and exposure assessment for the secondary review, to be followed by a policy assessment document outlining possible policy options for the administrator, prior to issuance of proposed and final rules either changing the NAAQS or leaving them unchanged. ***EPA*** staff said that the agency expects to complete the final ISA in summer 2019. -- Stuart Parker

DESPITE BIPARTISAN PRESSURE, EPA PUNTS ON NEW PFAS COMMITMENTS

Inside EPA | 09/13/2018

EPA's top drinking water official made no new commitments to speed up or add to current agency pledges to address perfluorinated chemicals despite bipartisan pressure from lawmakers and state officials who urged the agency at a Sept. 6 hearing to quickly develop a regulatory standard and take other steps to address the growing public concern over the chemicals.

"I think you can tell that Republicans and Democrats are pretty unified here on the concern about" per- and polyfluoroalkyl substances (PFAS), Rep. Debbie Dingell (D-MI) said at a Sept. 6 hearing focused on PFAS contamination and challenges held by the House Energy & Commerce Committee's environment subcommittee.

"I know we all keep asking the same question, but I think what's really got everybody worried is we need to change the national standard for what is a safe level," she told Peter Grevatt, director of ***EPA***'s Office of Ground Water and Drinking Water, who is leading the agency's PFAS policy efforts.

But Grevatt told Dingell and other lawmakers that the agency's development of a PFAS national management plan, to be issued by the end of the year, will provide a comprehensive look into more immediate steps ***EPA*** can take.

Late last month, he also raised doubts to state officials about a drinking water standard that many lawmakers and state officials are seeking, saying a single standard may not be appropriate to address the contaminants given their relatively limited distribution in drinking water systems.

EPA currently has no enforceable drinking water standard, but issued non-binding drinking water health advisories for two PFAS in 2016. Those advisories, however, are derived from risk values seven and 10 times less strict than ones the Agency for Toxic Substances and Disease Registry (ATSDR) endorsed earlier this year in a much-anticipated draft toxicological profile.

But Dingell said she believes all of the subcommittee members "have seen enough in scientific studies that we've got a problem." She added, "So are we talking about another two, three, four, five-year bureaucracy, or are we looking at something that's really going to get at this quickly to keep the American people drinking safe water?"

Grevatt responded that making sure drinking water is safe is a top priority for the agency, and noted that the PFAS management plan will be a comprehensive review across all statutory authorities about steps the agency can take to ensure Americans are protected.

But in response to questioning from Rep. David McKinley (R-WV), Grevatt conceded that PFAS compounds are not nationally ***EPA***'s top challenge, although they present significant challenges for communities where they are a contaminant in drinking water. Rather, he noted there are important issues the agency is facing related to drinking water treatment, especially disinfection and disinfection byproducts.

While calls among lawmakers and states at the hearing continued for ***EPA*** to develop an enforceable drinking water standard, Grevatt made no new commitments other than to continue to weigh whether to develop such a standard.

"We need a binding, enforceable, and strong drinking water standard," Rep. Frank Pallone, Jr. (D-NJ) said in his opening statement, noting that Democrats on the Energy & Commerce Committee have long pushed to set a

deadline for ***EPA*** to issue a stringent drinking water PFAS standard.

He said Congress should set a timeline for it, and require that the standard be protective.

Later, Pallone stressed the importance of a national drinking water standard because the Defense Department is not bound by state standards. Rather, he said, in such cleanups, DOD considers state levels as a factor. Witness Maureen Sullivan, DOD deputy assistant secretary for environment, conceded during questioning that state standards are rolled into the risk assessment process DOD conducts for a cleanup as a consideration.

Erik Olson, who testified on behalf of the Natural Resources Defense Council, told Inside ***EPA*** afterward that with ***EPA***'s lack of commitments on setting a drinking water standard or other actions, "states have to step into the vacuum."

He added that "it would be a major mistake for states to step back" and assume ***EPA*** will do it. In line with other environmental groups, he is calling for them to be treated as a class, rather than individually.

Nonetheless, witnesses who testified on behalf of state organizations called for ***EPA*** to address PFAS holistically -- not just in drinking water -- but also in other media and through other authorities.

Pennsylvania drinking water chief Lisa Daniels, testifying on behalf of the Association of State Drinking Water Administrators (ASDWA), in written testimony said the chemical compounds should be addressed nationally, "using a holistic approach" with Congress directing federal agencies to develop a unified message on the chemicals' risks, ***EPA*** listing the chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), ***EPA*** requiring PFAS reporting under the Toxic Release Inventory, and the agency taking other measures to limit PFAS contamination.

And Sandeep Burman, a Minnesota regulator speaking on behalf of the Association of State & Territorial Solid Waste Management Officials, told the panel that differing state standards for PFAS chemicals -- some of which have adopted ***EPA***'s 2016 non-binding drinking water health advisory of 70 parts per trillion (ppt) for two PFAS -- cause "questions and confusion for the public, as well as for regulated parties and regulators themselves."

He said national groundwater standards are "urgently needed" for PFAS "to promote consistent and comprehensive cleanups across the country." ***EPA*** recently sent to the White House Office of Management & Budget (OMB) for review draft recommendations for addressing two PFAS in groundwater.

"The current absence of established federal regulatory standards for these compounds is creating uncertainty as public drinking water and wastewater treatment systems, regulatory agencies, responsible parties, and others are responding to put in place appropriate measures to ensure that public health is protected," Burman said in his written testimony. "There is an urgent need for federal standards including reference doses, drinking water protection standards, surface water quality standards, and remediation standards that can be used to reliably address on-going public health concerns."

On listing PFAS as hazardous substances -- something ***EPA*** has previously said it is considering -- Grevatt told Rep. Paul Tonko (D-NY) that there are a number of ways in which ***EPA*** could achieve a hazardous substance listing. In addition to CERCLA, it could be done through the Clean Water Act, Clean Air Act and the Toxic Substances Control Act. He noted that the agency is currently looking at various authorities to list PFAS as hazardous substances.

Tonko later asked the state witnesses at the hearing about the impact such a listing would have, particularly if perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), two more commonly found PFAS, were listed.

Burman responded such a measure would allow states to bring the full weight of CERCLA to bear on PFAS, noting very few potentially responsible parties (PRPs) would otherwise voluntarily apply CERCLA. And Carol Isaacs, who heads Michigan's PFAS action response team, told the panel it would give states and ***EPA*** another tool to hold PRPs responsible for cleanup, potentially prompting less litigation by the state.

Olson added that without these chemicals listed under CERCLA, there is a real chance a PRP will simply refuse to conduct a cleanup. He added that just listing two chemicals may help at some sites, but the designation should cover a broader array of PFAS.

Grevatt also faced questions over ATSDR's draft tox profile for several PFAS. The document has attracted much attention in recent months due to the discovery of efforts by some in the Trump administration to block its release because of a feared "public relations nightmare" since the profile adopts risk values more conservative than

EPA's.

Rep. Fred Upton (R-MI) reiterated a query he and other Michigan lawmakers sent to ***EPA*** last month urging the agency to consider the tox profile and asking ***EPA*** to act quickly if it believes its 70 ppt advisory level should be adjusted due to the profile's findings. "Is that happening? What can we do to expedite the process?" he asked Grevatt.

Grevatt responded that the agency is carefully examining all the scientific data coming forward on PFOA and PFOS but said, "At this time, ***EPA*** does not have plans to change the drinking water health advisory" for the two chemicals.

Upton responded that he is the co-sponsor of upcoming legislation that will encourage ***EPA*** to look at that profile. The lawmaker noted at the hearing that he, along with other Michigan lawmakers, this month plan to introduce a bill that in part addresses federal facilities dealing with PFAS. He said he would like to see the legislation move this Congress.

The administration's handling of the ATSDR report also drew questions from other lawmakers. Rep. Gene Green (D-TX) asked Grevatt how ***EPA*** can reconcile the differences between ATSDR's much stricter toxicity values, compared to those ***EPA*** used for its 2016 health advisories.

Grevatt defended ***EPA*** by saying the purpose of ATSDR's document -- used for screening values -- differs from ***EPA***'s health advisories. In addition, he said ATSDR "chose to view the science somewhat differently than we did. We're working very closely with them on these issues to make sure we are sharing the best information we have as we go forward."

And Rep. John Sarbanes (D-MD) pressed DOD's Sullivan on whether she knew of the concerns by DOD officials cited in the emails earlier this year from executive branch officials that release of the ATSDR study could prompt a "potential public relations nightmare." Sullivan said she did not. She said at the time her communications with OMB "were solely to ask when it was going to happen and what the communication plans would be."

Sarbanes said he is worried that "concerns over public relations could lean on the scale in a way that undermines scientific conclusions" and assessments. -- Suzanne Yohannan

Return to Top

ORD'S PM ASSESSMENT ADVANCES, SIDESTEPPING AIR OFFICE OFFICIAL'S INFLUENCE

Inside EPA | 09/13/2018

EPA's Office of Research and Development (ORD) is completing work on the scientific document that will form the basis of the agency's review of its air quality standards for particulate matter (PM) after brushing aside efforts by a top air office political appointee who sought to raise doubts about the science, a departure from the usual process, ***EPA*** and other sources say.

During a briefing on the Integrated Science Assessment (ISA) for air office appointees, the official questioned whether ORD authors had sufficiently elucidated scientific uncertainties in some of the studies discussed in the ISA.

The official "didn't understand the ISA is an ORD document, not something that" air office appointees review, an agency source says.

By that point, ORD is "not looking for technical comments from policy people," a fact that was clarified, the source adds.

The dust up telegraphs the looming fight over ***EPA***'s pending review of its PM standards -- which are currently responsible for the bulk of federal regulatory benefits and which Trump administration officials and its supporters have long sought to scale back.

For example, many environmentalists are concerned that ***EPA***'s proposed science transparency rule, which bars the use of scientific research where the underlying data is not publicly available, would be used to target the science underlying PM standards.

They fear that mandating the use of such science would bar ***EPA*** from using studies like the Harvard Six Cities study, that have long been used to justify strict PM standards but would now be barred from use because the study participants' data is private medical data and not available for public review.

An ***EPA*** spokeswoman did not deny the claims but told Inside ***EPA*** that the agency, including the air and research offices, "is working to develop and assess the latest scientific and air quality information to facilitate meaningful feedback" by science advisors.

She said this process "is being conducted in a manner consistent with the Clean Air Act and the Agency's back-to-basics process" for reviewing air quality standards, and noted that the draft ISA and other documents related to the next review of the PM standard "have not been finalized or provided to ***EPA***'s advisors."

The Clean Air Act requires ***EPA*** to review its national ambient air quality standards (NAAQS) for criteria pollutants every five years and, based on a review of new science, ensure they are protective of human health and the environment with an "adequate margin of safety."

In a sign that the agency is anticipating a heated debate over its PM review, Clint Woods, the deputy air office chief, told a conference last month to expect a "robust" debate over the future of the fine PM (PM2.5) standard, which the agency last tightened in 2012 down to 12 micrograms per cubic meter (ug/m3) from the 2006 standard of 15 ug/m3.

Speaking at the Texas Environmental Superconference, Woods predicted some stakeholders will push for further ramping down the PM2.5 standard to as low as 5 ug/m3 as part of ***EPA***'s ongoing review of the limit, though he suggested such a limit might be technically impossible.

"I think there's a lot of those who think that science that has been developed since 2012 suggests that that standard needs to be in the single digits, and maybe as low as 5 [ug/m3], which is well below what any current monitor can measure," he said.

While the agency has long missed its statutory deadlines, ***EPA*** is on a fast track to complete separate rulemakings addressing PM and ozone by 2020 after then-Administrator Scott Pruitt issued a memo in May that accelerated the agency's previously planned schedules.

While Pruitt did not prescribe the scientific review and other steps the agency would take to meet that rulemaking deadline, in the case of the ozone review, he suggested a series of steps that could provide efficiencies for other reviews.

He also opened the door to changes in how some reviews are conducted, saying that the Integrated Science Assessments (ISA), Risk and Exposure Assessments (REA), and Policy Assessments (PA) "should focus on policy-relevant science and on studies, causal determinations, or analysis that address key questions related to the adequacy of primary and secondary NAAQS."

Nevertheless, the PM review appears to be following the past process, in which staff prepare separate scientific and policy reviews for consideration by agency advisers, who use them to provide recommendations to the administrator.

In accord with past practice, ORD has been preparing its ISA for peer review by the agency's Clean Air Scientific Advisory Committee (CASAC).

"The air office [is] not involved in the [ISA] document before it goes to review. That's been the precedent," says a knowledgeable source outside the agency.

But now, the source says, "It appears clear that the air office political leadership is doing that now. I'm not totally surprised. I've had the sense that staff is reviewing the 1,900 new studies since the last one and concluding that there are strong effects."

The appointees' requested changes to the draft PM ISA were not related to Pruitt's proposal last spring to bar the use of any scientific research where the underlying raw data are not publicly available, the source tells Inside ***EPA***. Though environmentalists have indicated that ***EPA***'s toxics office has taken steps to begin to implement this draft rule in its assessments of chemicals' human health risks, the source says that is not the appointees' concern with the PM ISA.

Rather, their questions suggested, for example, in the case of a study using a large Medicare database and showing health effects associated with air pollution below the current standard, that "there's not enough comment surrounding the uncertainty," the source adds.

Agency sources corroborated the account, though one source indicates there is a way forward to address the appointees' concern, and the ISA remains on schedule for release.

Still, the source outside the agency has heard that "ORD is not happy about the contravention for the way that this is normally done. ... Every impression I've got, they're not pushing to change the PM side, not to relax it because most places are in attainment. But they may be worried about interest in tightening it." -- Maria Hegstad

GROUPS DROP BID FOR CWA RULE INJUNCTION AFTER COURT'S STANDING QUERY

Inside EPA | 09/13/2018

Environmentalists are dropping their early appeal of a district court order that blocked enforcement of the Obama administration's Clean Water Act (CWA) jurisdiction rule in 11 mostly southern states, signaling that they will not push to expand the list of 26 other states that are now subject to the revived rule after a judge scrapped ***EPA***'s delay.

National Wildlife Federation and One Hundred Miles, a Georgia group, had jointly appealed the lower court's order to the U.S. Court of Appeals for the 11th Circuit but they filed a Sept. 7 notice voluntarily dismissing their appeal -- just one week after the court raised doubts that the groups had standing to pursue the case. Relevant documents are available on InsideEPA.com. (Doc. ID: 214998)

The notice does not give a legal reason for the dismissal, saying only that, "Appellants National Wildlife Federation and One Hundred Miles . . . hereby move to dismiss this interlocutory appeal, with each side bearing its own costs and fees."

The two environmental groups had hoped to overturn a June 8 injunction, from Judge Lisa Godbey Wood of the U.S. District Court for the Southern District of Georgia, that barred enforcement of the Obama-era jurisdiction rule in the states of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West

Virginia, Wisconsin and Kentucky.

Had the appeal succeeded, it would have revived the CWA rule in those states thanks to another district court order, from the district of South Carolina, that said ***EPA*** and the Army Corps of Engineers violated the Administrative Procedure Act when they halted enforcement of the Obama administration's policy until February 2020.

A separate order applies to 13 other states, for a total of 24 where the Obama-era rule does not apply, and at least seven other GOP-led states are seeking new injunctions that would further raise that number.

But the 11th Circuit questioned whether the appeal could go forward in an Aug. 31 notice that raised the "jurisdictional question" of "Do the National Wildlife Federation and One Hundred Miles have Article III standing to proceed on appeal?"

Judges have held that Article III of the Constitution gives standing to sue only when the party asking a court for relief can show concrete harm or injury from an action that can be "fairly traced" to the defendant, and that is "likely to be redressed" if the court rules in their favor.

The court gave all sides in the case until Sept. 14 to file briefs addressing standing, but the environmentalists instead opted to drop the appeal altogether.

Litigation over Wood's order will instead refocus on the Georgia district court, where state plaintiffs and industry intervenors filed motions for summary judgment on Aug. 31. They are urging Wood to overturn the jurisdiction rule permanently.

While the scope of the Georgia suit has narrowed thanks to environmentalists withdrawing their early appeal, other cases over the CWA rule are continuing to grow.

In South Carolina, the Trump administration and its industry allies are sparring with environmentalists over whether the judge's order that scrapped the enforcement delay was proper; both sides seem to agree that Judge David C. Norton was wrong to "enjoin" the regulatory stay, but environmental groups are saying he should simply amend the decision to vacate the delay instead, while the Department of Justice (DOJ) says the ruling should be scrapped.

"If the Court now intends to analyze the issues relating to the appropriate relief, it is within the Court's discretion to do so. But there is no legal or evidentiary support for the nationwide injunction now in place. The United States and its Agencies should not continue to be subject to a nationwide injunction while this Court determines if some other remedy is appropriate," DOJ says in a Sept. 6 filing with the South Carolina district court.

And the state of Oklahoma, along with national and local business groups, are seeking to revive their terminated suits over the 2015 rule, which would open the door to another request for an injunction that might apply either to the Sooner State specifically or the entire country.

The district court for the northern district of Oklahoma is still weighing an Aug. 17 request from the plaintiffs in State of Oklahoma, et al., v. ***EPA***, et al., to reopen the litigation so the court can rule on injunction requests that they filed shortly after the 2015 rule was enacted. Oklahoma and its allies voluntarily dropped their suit when the rule was stayed, but are now seeking to revive it thanks to the South Carolina case.

DOJ has backed the reopening, saying in a Sept. 6 filing that the end of the delay rule means the court should take up the case again, and environmentalists are asking to intervene on ***EPA***'s behalf to defend the rule and oppose an injunction. -- David LaRoss

BACKING CURRENT RULE, EPA URGES D.C. CIRCUIT TO REJECT OBAMA'S RMP UPDATE

Inside EPA | 09/13/2018

EPA, chemical manufacturers, and GOP-led states are urging a federal appellate court to reject environmentalists' request to compel the agency to quickly implement an Obama-era update to the agency's facility accident prevention rule, arguing petitioners have failed to show the rare move is needed and that a prior RMP rule reduces risks.

In separate Sept. 5 filings, ***EPA*** as well as state and industry intervenors urge a panel of the U.S. Court of Appeals for the District of Columbia Circuit to follow normal procedure, allowing the agency and other litigants adequate time to consider appealing the court's Aug. 17 ruling vacating the Trump administration's nearly two-year delay of an Obama-era update to the agency's Risk Management Plan (RMP) facility accident prevention rule. Relevant documents are available on InsideEPA.com. (Doc. ID: 214919)

The groups fault petitioners' claims that speedy implementation of the Obama-era rule is necessary to protect facility workers and communities, arguing that speedy implementation would affect only the rule's provisions for improved coordination with emergency responders, given later compliance dates for other provisions, and that the existing regulations already provide for such coordination.

"Without this Court's mandate, local emergency planners have and will continue to have a variety of tools to plan for and mitigate chemical accidents and releases," ***EPA*** says in its brief.

"While the Delay Rule deferred the initiation of coordination activities under the auspices of the RMP Amendments, ***EPA***'s long-standing Risk Management Program and [the Emergency Planning and Community Right-to-Know Act (EPCRA)] still require source coordination with emergency responders."

EPA also argues that rules of federal appellate procedure generally allow a federal agency at least 52 days before the entering of a final judgment to allow consideration of an appeal as well as orderly implementation of a rule.

And ***EPA***, as well as petrochemical industry intervenors and a dozen GOP-led states argue that environmentalist petitioners fail to show how expedited issuance of the mandate, a procedural step that in this case would step up the agency's implementation of the rule by one month, would improve safety.

"Petitioners offer a conclusory assertion that there will be 'serious and irreparable harm and imminent threats to public health and safety' if the mandate issues on October 8, 2018 (52 days from judgment), rather than on September 7, 2018," ***EPA*** says.

"But they point to no specific provision of the RMP Amendments that, if not immediately applicable, will cause irreparable harm during the 31-day interim period between when the mandate is supposed to issue under Court rules and when Petitioners request that the mandate be issued."

EPA and its supporters' calls came after the panel, in an Aug. 17 ruling in the case, Air Alliance Houston, et al., v. ***EPA*** and Andrew Wheeler, vacated the Trump administration's nearly two-year delay of the rule as a violation of the Clean Air Act.

Judge Brett Kavanaugh and two other judges heard oral argument in the case, but Kavanaugh did not participate in the ruling while his nomination to be the next Supreme Court justice is pending in the Senate.

The two remaining judges later granted environmentalists' request to speed implementation of the Obama-era update rule to protect facility workers and communities from future disasters.

But in a Sept. 4 order, the panel withdrew the mandate, saying its Aug. 31 issuance was "inadvertent," after ***EPA*** and state intervenors argued that judges' granting the request without giving litigants a chance to weigh in violated rules of appellate procedure, which allows for a 10-day response period.

EPA and intervenors said that they had planned to file on Sept. 4 responses to environmentalists' Aug. 24 request for an expedited mandate. The two-judge panel gave the parties until 4 pm Sept. 5 to file those responses.

Uncertainty from the court's action comes as the Trump administration is working to largely scrap the Obama-era rule, which brought new hazard analysis and auditing requirements and bolstered requirements for facilities to coordinate with and disclose data to emergency responders.

In the recent filings, ***EPA*** and intervenors argue that granting the request for an expedited mandate would undercut consideration of whether to seek rehearing of the Aug. 17 decision, and that forcing the agency to implement the rule a month early would not improve safety.

The parties also argue that compliance deadlines for most provisions of the Obama-era rule are several years in the future so expedited implementation would affect only the requirement that facilities coordinate with local responders. ***EPA*** also says that facilities are seeking guidance on how to comply with the new coordination provisions, suggesting implementation will be complex.

Industry intervenors, including the American Chemistry Council and the Chamber of Commerce of the United States argue that hasty implementation of the RMP rule could increase security concerns given the rule's provisions streamlining disclosure of facility data to first responders.

"[S]ecurity risks are a real concern," intervenors say. "Time is needed to coordinate with other stakeholders, inside of and outside of the federal government, who are deeply concerned about this provision of the RMP Amendments," the groups say. -- Dave Reynolds

WEHRUM'S NARROWING OF NSR 'ADJACENCY' TEST COULD RAISE BAR FOR PERMITS

Inside EPA | 09/13/2018

EPA is floating draft guidance that would narrow the definition of "adjacency" used as a factor in determining whether to combine nearby stationary sources for Clean Air Act new source review (NSR) permitting purposes, the latest in a series of steps that scale back NSR policy by making it easier for facilities to avoid strict "major" source permits.

Under current ***EPA*** rules, regulators must use three factors to determine whether to combine facility emissions for permitting purposes: the operations must be under common control, they must fall under the same major standard industrial classification code, and they must be on contiguous or adjacent properties.

But ***EPA*** air chief William Wehrum signed Sept. 4 draft guidance that would narrow the scope of the third factor, compared to its past method of allowing consideration of issues beyond "physical proximity" The draft guidance is available on InsideEPA.com. (Doc. ID: 215063)

The guidance, on which ***EPA*** is taking comment through Oct. 5, would limit NSR permit writers to only considering physical proximity of emissions sources located near each other, instead of a more expansive view the agency has previously used that also weighed the "functional interrelatedness" of sources to determine whether their emissions should be combined in permit reviews. "***EPA*** believes that focusing exclusively on physical proximity when considering whether or not operations are adjacent is a more objective and reasonable approach, and one that is more consistent with the dictionary meaning of 'adjacent,' the 'common sense notion of a plant,' and the original intent expressed in the early development of the NSR program" as established in 1980, Wehrum writes.

The change likely will make it easier for companies to argue that sources located on the same property but not physically proximate should be considered separate sources, which could make it easier to classify them as minor sources and avoid major source NSR permits that can require installation of strict -- and costly -- pollution controls.

If several nearby sources owned by one company are aggregated, their emissions are combined and could exceed the threshold for triggering stringent "major" source NSR permits, which are required for facilities in areas that are violating ***EPA***'s national ambient air quality standards.

By contrast, if several nearby sources are considered individual sources, then it is much less likely that the emissions from the single sources would be high enough to reach the major source threshold.

EPA says that its decision is based on a review of past agency actions and recent court decisions, citing a U.S. Court of Appeals for the 6th Circuit decision from 2012 in Summit Petroleum Corp. v. ***EPA*** that rejected a permit source determination that relied in part on functional interrelatedness to determine adjacency. The agency now believes that functional interrelatedness "is not a relevant consideration" when assessing the adjacency of sources.

Wehrum's guidance, if finalized, would apply to all industries except for the oil and gas sector, for which the agency in June 2016 established a distinct definition of "adjacent" that says facilities located within a quarter mile of each other, with shared equipment, are considered to be adjacent.

The draft guidance, sent to the air division directors of all 10 ***EPA*** regions, says the agency now believes that "adjacency" solely means physical proximity.

But Wehrum is not proposing a "bright line" specific fixed distance to determine proximity, saying instead that permitting authorities will have to make those decisions on a case-by-case basis.

"***EPA*** believes . . . that a determination that operations are 'adjacent' can be made only where it is reasonable to conclude that the operations in question are truly in physical proximity to each other. That is, 'proximity,' which generally conveys the concept of side-by-side or neighboring (with allowance being made for some limited separation by, for example, a right of way), must exist, and the determination must ultimately comport with the 'common sense notion of a plant,'" Wehrum writes.

The guidance is the latest step in a piecemeal approach to NSR reform that Wehrum is pursuing, after his prior sweeping NSR regulatory overhaul during the George W. Bush ***EPA*** either stalled or was struck down by the D.C. Circuit. The Trump administration's strategy for overhauling the NSR program is a mixture of guidance and regulation on key issues including aggregating emissions, and revising a policy on what qualifies as facility "maintenance" exempt from NSR.

EPA's Affordable Clean Energy utility greenhouse gas rule replacement for the Obama-era Clean Power Plan also proposes to ease the emissions test for triggering NSR at power plants, reviving a decades-old fight and putting ***EPA*** on the opposite side of the issue from when it was last litigated early in the Bush administration.

Industry groups and Republicans have long claimed that ***EPA***'s NSR program is too onerous and that the threat of costly major source permits can discourage economic growth by making companies wary of expanding operations for fear of triggering NSR.

They are likely to welcome Wehrum's guidance because it could raise the bar for requiring NSR at nearby facilities if permit writers believe they are not physically proximate, even if they would have met the threshold for NSR permits under the prior functional interrelatedness test.

But states and environmentalists are expected to challenge the guidance's application, according to Eric Boyd, an attorney at Thompson Coburn, LLP, a law firm. In a Sept. 10 note, he says states and environmental groups are likely to challenge the policy once it is final. But he says that because ***EPA*** has sought to make clear the guidance is not a final action subject to judicial review, the agency expects that any challenges will come "when the guidance is used in permitting decisions, not when the guidance is finalized." -- Anthony Lacey

4TH CIRCUIT SAYS COAL ASH LEAKS NOT 'POINT SOURCES' SUBJECT TO CWA LIMITS

Inside EPA | 09/13/2018

A federal appeals court has rejected Sierra Club's suit trying to impose Clean Water Act (CWA) penalties for leaks from a Virginia coal ash disposal site that traveled through groundwater to nearby surface waters, ruling the site is not a "point source" subject to CWA limits -- a major blow for environmentalists' legal bid to force such controls.

The Sept. 12 ruling by a unanimous three-judge panel of the U.S. Court of Appeals for the 4th Circuit in Sierra Club, et al., v. Virginia Electric Power Company (VEPCO) says that an ash facility is not a "discernible, confined and discrete conveyance," which is the CWA's definition of a point source that is subject to liability for unpermitted discharges. The ruling is available on InsideEPA.com. (Doc. ID: 215106)

"[A]rsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and ponds were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example," reads the decision, which is authored by Judge Paul V. Niemeyer for the panel of himself and Judges Stephanie D. Thacker and William B. Traxler, Jr.

The decision, which deals with leaks from VEPCO ash sites at its Chesapeake, VA, power plant, marks the first time an appellate court has weighed in on whether ash sites can be categorized as point sources in a CWA citizen suit. The question is central to environmentalists' wide-ranging legal strategy of targeting leaking impoundments and landfills through the water law, rather than the Resource Conservation and Recovery Act (RCRA) under which ***EPA*** regulates ash disposal sites.

However, the 4th Circuit is now saying that the waste law is the proper venue for addressing water pollution from ash sites, even if it reaches surface waters.

"Of course, the fact that such pollution falls outside the scope of the Clean Water Act's regulation does not mean that it slips through the regulatory cracks. To the contrary, the ***EPA*** classifies coal ash and other coal combustion residuals as nonhazardous waste governed by the RCRA," the decision says.

EPA's 2014 RCRA rule governing ash disposal establishes groundwater monitoring requirements for disposal sites and requires them to shut down if they cannot adequately prevent leaks. However, that rule is in flux, with ***EPA*** both working to delegate enforcement to states and crafting revisions that environmentalists say will weaken its protections nationwide. Further complicating the agency's regulatory changes, the D.C. Circuit in a recent ruling held that the original Obama-era rule was not strict enough.

Given the uncertainty over the RCRA rule, Sierra Club and other environmental groups have seen CWA citizen suits as an avenue to demand immediate cleanups and other penalties at facilities that have contaminated nearby surface waters, bypassing the RCRA rule's procedures and years-long compliance timelines.

As plaintiffs in the CWA cases, the environmental groups have argued that even though the law does not limit groundwater pollution directly it still covers leaks that travel through groundwater to lakes, streams and other jurisdictional waterbodies.

But defendants in the citizen suits have argued both that the CWA never extends to groundwater-borne contamination, and that ash sites are not "point sources" subject to the water law in any event. The environmentalists can only prevail if courts agree with them on both points: That that ash sites are point sources, and that their leaks to groundwater are "discharges" covered by the act.

So far, the 4th and 9th Circuits have both held in 2018 cases that pollution traveling through groundwater to surface waters can be a discharge subject to CWA liability. But those suits dealt with pollution that even the operators agreed came from point sources -- a wastewater injection well in the 9th Circuit's Hawai'i Wildlife Fund, et al., v. County of Maui and a broken gasoline pipeline in the 4th Circuit's Upstate Forever, et al., v. Kinder Morgan Energy Partners.

Defendants in both those cases are now asking the Supreme Court to overturn those decisions on the CWA-groundwater question.

But the VEPCO panel's ruling signals that even if those decisions stand, environmentalists will have an uphill fight to win the "point source" half of their cases.

That, in turn, could be a major blow to the groups' goal of winning more stringent cleanup orders for leaking sites than the RCRA ash rule allows.

In VEPCO and other suits, the environmentalist plaintiffs have argued that the only way to effectively contain leaks from disposal sites is to excavate the ash stored there and move it to a more protective facility -- a much more costly remedy than drying out and "capping" such sites, which has been industry's preferred solution for many facilities.

The lower court in VEPCO stopped short of an excavation order, holding that while a "cap" would not be sufficiently protective the cost and potential harms from removing the ash entirely were out of proportion to the actual harm caused by leaks. However, Sierra Club and its allies are still touting the factual findings of that district-level decision, which the 4th Circuit let stand, as a sign that more stringent remedies are needed.

"Today's decision, while disappointing, does not affect the lower court's factual determination that arsenic is leaking from coal ash pits at [VEPCO's] Chesapeake facility and flowing directly into the Southern Branch of the Elizabeth River; nor does the decision alter the lower court's determination that simply capping the ash in place is not an acceptable solution to this problem," says a Sept. 12 statement from the Southern Environmental Law Center, which represents Sierra Club in the 4th Circuit case. -- David LaRoss

Return to Top

EPA FLOATED, BUT DROPPED, PLAN TO 'DECLINE' CO2 RULES IN ACE PROPOSAL

Inside EPA | 09/13/2018

The Trump ***EPA*** in its draft proposal to replace the Obama-era Clean Power Plan (CPP) to cut utility sector greenhouse gases wanted to solicit comment on not regulating the sector's carbon dioxide emissions at all, according to newly released documents, though Trump officials ultimately dropped that possibility in the final proposal.

Although the agency dropped the idea, it nevertheless raises the prospect that administration officials may still be seeking to avoid CO2 rules under the Clean Air Act -- even though this may open the door to facilities facing common law claims for their emissions that would otherwise be preempted by ***EPA*** rules.

An Aug. 16 document -- which outlines ***EPA***'s response to a red-lined version of its then-draft proposed "Affordable Clean Energy" (ACE) rule -- includes a paragraph in which ***EPA*** floated an option where it would not regulate power plants' CO2 emissions under the rule. Relevant documents are available on InsideEPA.com. (Doc. ID: 214966)

Specifically, the since-deleted rule text reads: "In consideration of these ongoing and projected power sector trends and a resulting decline in power sector CO2 emissions, ***EPA*** is soliciting comment on whether it would be appropriate -- as an alternative to replacing the CPP (once repealed) -- to decline to regulate CO2 emissions at this time."

The scrapped text added that ***EPA*** analyzed Energy Information Administration (EIA) projections "since the release of original proposed CPP and found that in a number of cases changes in power sector result in CO2 emission reductions at a faster rate than projected even a few years ago when the CPP was promulgated. Given the uncertainties associated with long-term emission projections, ***EPA*** also notes that in some cases CO2 emissions increase over time, and solicits comments on the applicability of those alternative results."

The paragraph was ultimately deleted during White House Office of Management & Budget (OMB) interagency review, though it is not clear who directed the change.

Just five days later, ***EPA***'s Aug. 21 ACE proposal said only that it is "soliciting comment on whether and how to consider such trends in developing CO2 emission guidelines for the power sector."

The Aug. 16 version also includes comments from ***EPA*** noting that "the preamble has been tweaked to solicit comment on whether and how to consider the overall trends in regulating CO2 for the power sector," but the agency did not ask OMB to explicitly allow it to include language on not regulating CO2 from coal plants, which are the only type of plants covered by ACE. The CPP included natural gas-fired power plants as well.

EPA in its reply does address some of the EIA projections that include power sector GHG emissions possibly rising, while noting uncertainties associated with many of them. ***EPA*** adds, "The specifics of the EIA scenarios are not necessarily germane here in context of when we have a high level of certainty that these trends will continue."

The decision to drop language considering not regulating CO2 is just one of the many changes made during interagency review of the plan. ***EPA*** added to the rulemaking docket Aug. 31 a host of versions of its draft proposal and regulatory impact analysis (RIA), including OMB and other agency comments.

For example, a July 23 red-lined version of the RIA shows that ***EPA*** originally included language warning about the dire impacts of climate change -- provisions that were ultimately significantly watered down.

Citing the National Research Council, the draft RIA said, "Emissions of CO2 from the burning of fossil fuels have ushered in a new epoch where human activities will largely determine the evolution of Earth's climate. Because CO2 in the atmosphere is long lived, it can effectively lock Earth and future generations into a range of impacts, some of which could become very severe. Therefore, emission reduction choices made today matter in determining impacts experienced not just over the next few decades, but in the coming centuries and millennia."

Under the heading "Health and Welfare Impacts from Climate Change," the draft RIA also noted that since ***EPA*** issued its GHG endangerment finding in 2009, the "climate has continued to change, with new records being set for a number of climate indicators such as global average surface temperatures, Arctic sea ice retreat, CO2 concentrations and sea level rise. Additionally, a number of major scientific assessments have been released

that . . . strengthen the case that GHGs endanger public health and welfare both for current and future generations."

The proposed Aug. 21 RIA substitutes that with a section called "Climate Change Impacts," which says, "In 2009, ***EPA*** Administrator found that elevated concentrations of [GHGs] in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare. It is these adverse impacts that necessitate ***EPA*** regulation of GHGs from EGU sources. Since 2009, other science assessments suggest accelerating trends."

The title of this section also drops the word "scientific" from the proposed version's "Legal, Scientific and Economic Basis for this rulemaking." The proposed language now details the "Legal and Economic Basis for this rulemaking."

The Environmental Defense Fund (EDF) first noted the administration's decision to drop the climate warnings from the documents, saying in a Sept. 5 release that the change appears intended to allow ***EPA*** to "scrap the [CPP] and replace it with a vastly weaker program that would substantially increase climate pollution.'"

EDF's Tomas Carbonell said in the statement that the language changes "raise serious questions about why ***EPA*** removed fundamental information about climate science from a proposed rule that deals specifically with climate pollution. This administration has a long history of attempting to censor the science underpinning our most important health and environmental protections, and this seems to be an egregious example of that. Climate change is a clear and present danger to all Americans and ignoring it is not an option."

Another possibly significant change in the RIA, according to the newly released documents, regards a description of whether the ACE plan would repeal or replace the CPP.

The earlier version of the preamble originally said ***EPA*** was taking "four distinct actions" including, "This action is proposed as an alternative to the proposed repeal of the CPP."

EPA last fall proposed a direct repeal of the Obama ***EPA*** rule and at the end of 2017 issued an advance notice of proposed rulemaking (ANPR) to seek comment on a possible replacement. ***EPA*** has not yet finalized the proposed repeal and considers the ACE proposal the next step after the ANPR.

In contrast to the draft, the publicly released preamble says ***EPA*** is proposing "three distinct actions," including that it is "proposing to replace the [CPP] with revised emissions guidelines [ACE] that inform the development, submittal and implementation of state plans to reduce GHGs from" coal plants. It describes the proposal as "consistent with the interpretation described in the proposed repeal of the CPP," but does not suggest the rulemaking would take the place of the repeal proposal, or that ***EPA*** will continue to advance the repeal.

If finalized, the repeal measure could face a legal challenge apart from litigation over the stringency of any replacement. Litigation over the original CPP remains on hold in the U.S. Court of Appeals for the District of Columbia Circuit.

Also posted to the docket are a number of summaries of interagency comments that strongly criticize ***EPA*** for replacing the CPP with a weaker, narrower version.

For example, a July 25 summary of interagency comments quoted an un-named agency charging that the ACE plan imposes inflexible regulatory requirements, shifting away from market-driven policies, such as those contained in the CPP, that have been shown to reduce compliance costs.

"For the last 40 years, ***EPA*** has increasingly used market forces to ease the regulatory compliance burden and ultimately reduced costs to consumers. This proposal moves in the opposite direction," the comment says. "Requiring states to establish performance standards for [heat rate input] on a unit-by-unit basis based on a 'range of unit-specific factors' is the antithesis of allowing firms flexibility in deciding how to comply. Imposing individually tailored restraints outlined by a federal body fails to utilize half a century's worth of industry and professional knowledge that has allowed for massive reductions in the price of electricity for American corporations and citizens."

One environmentalist points to that comment as significant, as well as general back-and-forth about the negative social costs of the rule. ***EPA*** acknowledges these costs in its RIA, including that ACE would bring more adverse health effects including as many as 1,400 more premature deaths, and little to no GHG reductions.

The source also says the interagency comments are "confirmation . . . that ***EPA*** is not setting a national standard but leaving it up to the states to set standards based on a [best system of emissions reduction (BSER)] that is

very limited, and chosen by the agency, but the agency has not set a standard based on its preferred BSER. The back and forth also clarifies that compliance dates are fluid and enforcement is standardless."

The July 25 summary also includes a comment that it is "Not clear what standard ***EPA*** is proposing," and that it is "Not clear how ***EPA*** proposes to enforce" the rule.

An Aug. 7 summary notes that the proposal seeks comment on a "range [of] topics that the agency previously requested comment on" for the CPP, the ANPR and again now, without including "any new technical analysis that reflects that ***EPA*** has reviewed and understands" the prior comments. If ***EPA*** finalizes this proposal it "should at some point summarize and acknowledge original comments that are relevant."

An Aug. 15 document includes a comment that only imposing heat-rate standards will lead to unnecessarily high compliance costs as older coal plants are not retired when it is economically efficient to do so.

None of the summaries identify the agencies making the comments. -- Dawn Reeves

KAVANAUGH HINTS AT CPP OPPOSITION WITH ATTACK ON AGENCY POLICYMAKING

Inside EPA | 09/13/2018

Supreme Court nominee Brett Kavanaugh is hinting that he would vote to strike down the Obama ***EPA***'s Clean Power Plan (CPP) utility greenhouse gas rule, attacking agencies for relying on ambiguities in "old law" to justify novel new policymaking efforts after they fail to convince Congress to approve legislation to authorize the policies.

Responding to a question from Sen. Orrin Hatch (R-UT) during the Sept. 5 session of the week-long Senate Judiciary Committee hearing on his nomination, Kavanaugh described "a natural tendency that judges need to be aware of and respond to" where agencies respond to Congress rejecting legislation that would expand their authority by claiming that they already have that authority thanks to ambiguities in existing law, and that judges should defer to those claims.

"[A]n executive branch agency wants to do some new policy, and proposes a new policy to Congress. But Congress doesn't pass the new policy. What often happens, or too often, I've seen, is that the executive then relies on the old law as a source of authority to do this new thing. And they try to say 'well, the old law is ambiguous, so we can fit this new policy into the old law,' as justification for doing this new thing. I've seen this in national security cases, I've seen this in environmental cases -- you see it all over the place," Kavanaugh said.

While Kavanaugh did not name a specific rule or agency in his example, the scenario he outlined closely tracks the Obama administration's development of its CPP that set GHG standards for existing power plants.

The Trump administration is moving to repeal the CPP and replace it with the much narrower Affordable Clean Energy (ACE) rule that would limit GHG reduction mandates to steps taken within the fenceline of a power plant. Litigation over the CPP is on hold in the U.S. Court of Appeals for the District of Columbia Circuit -- where Kavanaugh currently serves as a judge -- while the agency pursues the repeal and replace plan.

The nominee's comments suggest that if, as expected, he is confirmed and the high court reviewed the CPP then he would vote to find it exceeded ***EPA***'s rulemaking authority because Congress never approved climate legislation.

In 2009, Democrats approved a cap-and-trade bill in the House but were unable to muster support for it in the Senate. After the legislation died, ***EPA*** invoked its existing Clean Air Act authority to enact the CPP in 2015, saying the law already gave it power to limit GHGs from power plants. Subsequent litigation over the rule focused on whether it was a permissible application of ambiguous language in the air law.

Kavanaugh heard argument over the legality of that rule as a D.C. Circuit judge in September 2016, after the Supreme Court stayed implementation of the CPP that February pending a decision on its merits. But the court never issued a ruling, instead placing it in abeyance after President Donald Trump took office the following year.

His comments as a nominee now could signal that he intended to vote that the CPP is unlawful, and that he would back a more limited policy such as the Trump ***EPA***'s newly proposed ACE rule that reads the Clean Air Act as only authorizing GHG control mandates for facility-specific controls, rather than the Obama rule's statewide caps on GHG emissions.

However, Kavanaugh also touted what he said are decisions that backed more-stringent environmental policies, such as 2014's Natural Resources Defense Council (NRDC) v. ***EPA***, where he voted to reject an agency policy allowing an "affirmative defense" against prosecuting industrial facilities for Clean Air Act violations.

Describing the affirmative defense ruling at the hearing, Kavanaugh said, "It's not in the law. Yes, that might be a problem for industry, but we follow the law."

The nominee also cited the trio of 2015 cases In re: Murray Energy, Murray Energy, et al. v. ***EPA***, et al., and West Virginia, et al. v. ***EPA***, et al., where he voted to reject challenges to a proposed version of the CPP after finding they were filed too early -- calling the suits "premature" at the hearing -- because proposed rules are not final agency actions subject to judicial review.

Kavanaugh said, "I'm a pro-law judge. And in environmental cases, in some cases I've ruled against environmentalists' interest, and in many cases I've ruled for environmentalists' interests, and they're big cases."

But environmentalists are already pushing back on those claims, arguing that many of the decisions Kavanaugh listed were not actually rulings in their favor.

For instance, in a Sept. 4 blog post, Earthjustice Vice President of Litigation Patrice Simms writes that Kavanaugh's NRDC ruling backed industry on "every one of their claims related to the stringency of the ***EPA***'s clean air standards (the claims that mattered most to public health protection)."

Simms continues that the affirmative-defense portion of the ruling turned not on a standard of protection but "***EPA***'s attempt to infringe on judicial authority by creating procedures for regulatory 'affirmative defenses' to citizen suits. For Judge Kavanaugh, because it involved the ***EPA*** usurping power properly reserved for the judiciary, this was a step too far, even in service of letting polluters off the hook."

Kavanaugh's comment on rulemaking procedure came as the response to a broad question from Hatch on the issue of so-called Chevron deference, which is the principle where judges will defer to agencies' "reasonable" interpretations of ambiguous statutory text.

Hatch has been a leading opponent of the Chevron doctrine in recent years, attacking it as counter to the separation of powers because it undermines courts as the sole arbiter of how laws should be interpreted.

While Kavanugh did not directly address whether he would overturn Chevron if confirmed to the high court -- part of a pattern of refusing to state a definitive position on any specific issue that might come before the court -- he said he would clearly enforce what he sees as the "bounds" that Congress has set on agency authority.

"I'm not a skeptic of regulation at all. I'm a skeptic of unauthorized regulation -- of illegal regulation. Of regulation that's outside the bounds that laws passed by Congress have set," he said.

Prior to Hatch's questioning, Sen. Ben Sasse (R-NE) used his Sept. 4 opening statement to attack Chevron deference as an abuse of the separation of powers -- although without referring to it by name -- when he said that delegating rulemaking authority to "alphabet-soup agencies" undermines the separation of powers.

And in a passing comment during his questions for Kavanaugh, Senate Judiciary Committee Chairman Charles

Grassley (R-IA) praised "the wise words of Sen. Sasse yesterday on separation of powers."

Kavanaugh did not address that statement in his exchanges with Grassley, but in his answer to a question on the qualities that make a "good" judge, he said one important factor is "Not deferring when the executive rewrites the laws passed by Congress, but respect for the laws passed by Congress, respect for the words put into the Constitution itself." -- David LaRoss

AMID SENATE TALKS, STATES RENEW OPPOSITION TO CWA SECTION 401 BILL

Inside EPA | 09/13/2018

State water quality regulators are reiterating their objections to Senate GOP legislation that would limit their rights to block federally approved projects under section 401 of the Clean Water Act (CWA) -- just as senators were expected to issue a revised bill based on talks between states and other stakeholders.

The latest state criticisms suggest that lawmakers are still far from getting stakeholders to agree on a path forward, raising new doubts about the bill's legislative prospects.

In a Sept. 6 letter to lawmakers, the Association of Clean Water Administrators (ACWA) and Association of State Wetlands Managers (ASWM) charge there is insufficient evidence of states abusing the authority to justify rolling it back, as the bill's supporters have claimed, nor is there evidence that curtailing state authority to determine whether a federally permitted activity will protect water quality is needed. The letter is available on InsideEPA.com. (Doc. ID: 215028)

"If enacted as written, S. 3303 would modify the CWA, and limit the states' authority under ¤401 to protect state water quality and provide critical input on the impacts posed by federal permits and licenses," ACWA and ASWM write in their letter to the chairman and ranking member of the Senate Environment and Public Works Committee (EPW).

"The recent limited instances where projects have been stopped due to a water quality certification denial are not adequate to justify minimizing clearly authorized state authority to manage and protect the water resources in their states," the groups add.

The letter from ACWA and ASWM follows indications that committee leaders were planning to issue a revised version of the bill to address concerns from states and others.

Among the key changes states and many Democrats were seeking was an amendment that would maintain states' power to allow continued oversight of federal "activities" rather than the bill's current language which limits their purview to "discharges."

As introduced, S. 3303 would clarify that the section 401 reviews are limited to water quality impacts only; clarify that states can only consider discharges that would result from the federally permitted or licensed activity itself and not other sources; require states to publish clear requirements for water quality certification requests; require states to make a final decision in writing on whether to grant or deny a request for a 401 certification; and require states to inform a project applicant within 90 days whether the states have all of the materials needed to process

a certification request.

EPW Chairman John Barrasso (R-WY), the bill's sponsor, has called S. 3303 "commonsense legislation to clarify current law, ensure a more predictable permitting process, and to prevent costly delays." Following an Aug. 16 legislative hearing on the bill, Barrasso said EPW plans to hold a markup on the legislation, though he would not commit to a timeline for it, saying the committee is working on several other issues.

An EPW spokesman said Sept. 10 that the "committee has not scheduled a business meeting on the legislation at this time."

While ACWA and ASWM previously joined the Environmental Council of the States (ECOS) in urging House and Senate leadership to use caution when considering changes to the 401 process, the new ACWA and ASWM letter to Barrasso and EPW Ranking Member Thomas Carper (D-DE) cites concerns with S. 3303, especially over language that would limit states' authority.

"It is well established that ¤401 authorizes states to consider additional requirements or limitations on the potential permitted activity once it is determined that the activity will result in a discharge to waters. Curtailing or reducing state authority or limiting the vital role of states in maintaining water quality within their boundaries would inflict serious harm to the collaborative and cooperative relationship established by Congress when passing the CWA, undermining state expertise and experience with local waterbodies."

"We firmly believe that any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not occur at the expense of clearly articulated statutory authority delegated to states," ACWA and ASWM say.

Proponents of S. 3303 point to several high-profile cases where states have denied a section 401 certification or delayed action on a certification request as evidence the legislation is needed.

But the state regulators say section 401 certification is not the obstacle to issuing federal permits or licenses that some supporters of section 401 reform claim, as most state section 401 certifications are issued within a year of their request.

The rare instances when certifications have not been issued in a timely manner are usually due to actions or inactions by the project proposers themselves, the state officials say. Examples of these challenges include incomplete or inconsistent application packages that are missing key information; design or construction plans that have been altered without supplying regulators with updates on the impacts of the changes; slow responses or even refusals by regulated entities to respond to state requests for information; and certification requests that are filed prior to completion of all federal permitting reviews.

EPA has begun exploring administrative changes to the 401 process, an approach that some former Federal Energy Regulatory Commission officials who now represent energy companies have said might better address concerns that states are improperly blocking projects by denying 401 certification, compared to legislation.

But some state officials at a recent ECOS meeting indicated that no changes are needed and raised concerns that any ***EPA*** action could undercut state authority. -- Lara Beaven

CONGRESS SLATED TO RENEW DRINKING WATER SRF FOR FIRST TIME IN 15 YEARS

Inside EPA | 09/13/2018

House and Senate negotiators have agreed to compromise water infrastructure legislation that renews ***EPA***'s drinking water state revolving fund (DWSRF) at higher levels than when the program was last authorized 15 years ago though the deal further narrows a controversial Senate plan to overhaul ***EPA***'s loan guarantee program.

The leaders of the three committees that developed the bill, S. 3021, said Sept. 10 the legislation could be considered on the House floor later this week. The Senate is expected to vote on the bill once it passes the House. The bill is available on InsideEPA.com. (Doc. ID: 215064)

While the initial House Water Resources Development Act (WRDA) legislation was limited to authorizing Army Corps of Engineers civil works projects, the version approved by the Senate environment committee (EPW) contained language to alter ***EPA***'s Water Infrastructure Finance and Innovation Act (WIFIA) program.

The Senate provision, known as Securing Required Funding for Water Infrastructure Now (SRF WIN), would amend WIFIA to create a new class of loans that would be available exclusively to states to pay for projects listed on their state revolving fund (SRF) intended use plans, and provide preferential loan terms for states compared to other applicants for WIFIA funding.

The language drew praise from the Council of Infrastructure Financing Authorities, National Rural Water Association (NRWA), and National Association of Clean Water Agencies, which said SRF WIN would target federal funding to communities with the most need or merit and allow states to choose projects to meet state-determined needs.

But the American Water Works Association (AWWA), Association of Metropolitan Water Agencies (AMWA) and the Water Environment Federation opposed the provision, arguing it would undermine ***EPA***'s current funding programs.

The compromise bill retains a funding authorization limited to states but at only $5 million annually for fiscal years 2020-2021 compared to the $100 million EPW approved, and contingent on the DWSRF and clean water SRF both being funded at 105 percent of the previous year's funding.

EPW was forced to reduce authorized funding levels for SRF WIN to overcome a Congressional Budget Office estimate that found an earlier version of the program would reduce federal revenues by $2.6 billion over 10 years and open the door to a point of order that would require 60 votes to overcome.

The reduced funding authorization "makes the program somewhat pointless," says a source with AWWA, which represents a variety of drinking water utilities. "However, proponents may be gambling that they can convince appropriators to not only waive the requirement that WIFIA get $50 million and the SRFs 105 percent of the previous year's funding before SRF WIN can get funded, but in addition, talk appropriators into providing more funding."

"We appreciate that the final bill does not include the version of the SRF WIN Act that was part of the EPW Committee's" legislation, says a source with AMWA, which represents large municipal drinking water utilities. "Instead, WRDA includes a few provisions that will encourage states to compile multiple small projects together into a single WIFIA application (as they are currently able to do)," and authorizes a total of $10 million over two years for the project provided water infrastructure funding targets are met.

"The most problematic parts of SRF WIN that we opposed (such as lower interest rates for certain states and a different project selection criteria for state-compiled projects) are not part of the final bill," the AMWA says.

An NRWA source, however, is praising the inclusion of the remaining SRF WIN language as a win for small and rural communities.

Additionally, the AMWA and AWWA sources say they appreciate WIFIA has been reauthorized for FY20-21 at a "strong" funding level of $50 million annually. WIFIA's funding authorization is currently scheduled to expire in 2019.

The compromise bill developed by EPW, House Transportation and Infrastructure Committee and House Energy

and Commerce Committee also includes language reauthorizing the DWSRF and making additional modifications to the Safe Drinking Water Act (SDWA) that the commerce committee approved last year. Authorization for the DWSRF expired in 2003 although Congress has continued to appropriate money for the infrastructure funding program.

The bill authorizes funding for the DWSRF at $125 million annually compared to $100 million previously.

Other drinking water changes include stronger requirements for notification of downstream water utilities when a chemical spill occurs; allowing Consumer Confidence Reports to be provided electronically rather than in the mail; increased funding for the Public Water System Supervision grants for state primacy agencies; an update to drinking water utility provisions in the Bioterrorism Act of 2002; and the creation of a competitive grant program to help drinking water systems increase the resilience of their infrastructure to natural hazards.

The bill also authorizes ***EPA***'s WaterSense voluntary water conservation program, encourages the use of asset management planning; calls for a study of best practices for administering the SRF program with an eye toward streamlining the program; and directs ***EPA*** to develop regulations that would allow states to require drinking water system owners or operators to assess options for consolidation or transfer of ownership if the utility is repeatedly out of compliance with SDWA.

The NRWA source notes several other provisions in the bill that address small and rural community water issues. These include the creation of a federal technical assistance program to assist small public wastewater treatment systems in complying with ***EPA*** regulations and several DWSRF changes aimed at these communities.

"Small and rural communities have more difficulty affording public wastewater service due to lack of population density and lack of economies of scale. Likewise, they have a much more challenging time complying with our federal Clean Water Act permits and operating complex wastewater treatment systems due to the lack of technical resources in small communities," the NRWA source says.

Although NRWA is not named specifically in the bill, the legislation's description of a nonprofit organization providing technical assistance to small, rural and tribal communities matches NRWA's Circuit Riders.

The drinking water section of the bill improves the current Safe Drinking Water Act targeted funding to disadvantaged communities and small communities with minimum set-asides, and prioritization of projects with the greatest environmental and economic need, the NRWA source says.

The bill extends maximum loan duration up to 40 years and increases to 35 percent the amount of additional subsidization to include forgiveness of principal that can be used in disadvantaged communities. "Commonly, low income or disadvantaged communities do not have the ability to pay back a loan, even with very low interest rates, and require some portion of grant or principal forgiveness funding to make a project affordable to the ratepayers," the source says. -- Lara Beaven

HEALTH RISK DISPUTE OVER EPA'S ACE RULE FOCUSES ON REGULATORY BASELINE

Inside EPA | 09/13/2018

As criticism mounts over the health risks posed by the Trump ***EPA***'s proposal to replace the Obama-era Clean Power Plan (CPP) governing power plants' greenhouse gas emissions, a key difference between the two sides hinges on the rule's baseline and whether to compare the effects of the new "Affordable Clean Energy" (ACE) rule to the CPP's.

Trump ***EPA*** officials are downplaying agency findings that the proposed ACE rule will cause significant health risks compared to the CPP, arguing it is unfair to compare the new plan to the prior rule because the CPP was never fully implemented after it was stayed by the Supreme Court.

However, opponents say that ***EPA*** must compare its new rule to the CPP that it would replace, because the Obama-era rule remains in the Code of Federal Regulations and was never vacated by a court.

While sparring between the agency and its critics on the cost-benefit analysis is a technical dispute, it is already playing out in public debate over the rule.

Shortly after ***EPA*** unveiled its ACE proposal last month, opponents of the rule began citing the agency's findings in its regulatory impact analysis (RIA) that the plan could cause up to 1,400 more premature deaths from air pollution each year by 2030, compared with the CPP, as well as a host of other negative health and economic impacts.

Such criticisms are already driving legal arguments. If ACE is finalized, ***EPA*** will "face enormous legal hurdles because it will have to explain why it is exercising its discretion to pick a legal interpretation that causes so much harm," Ricky Revesz, dean emeritus of New York University's law school, told reporters on an Aug. 21 call.

Pressed on this point, acting Administrator Andrew Wheeler told an event in Kentucky that the proposal would not roll back bedrock air quality standards.

"The air quality is 73 percent cleaner than in the 1970s," he said, according to a local media report. "The regulations that got us to that point are still in effect. They'll still be in effect tomorrow. They'll still be in effect next year. Those are the health-based air standards. Nothing has been done to impact those."

Wheeler acknowledged that the ACE rule would not cut as many GHGs compared to the CPP, but said that the Supreme Court stay of the Obama-era rule meant it "never actually went into effect."

Agency officials say the ACE rule is focused solely on GHGs, and that they can rely on robust air regulations, including the national ambient air quality standards (NAAQS) program, to limit harm from conventional air pollutants such as sulfur dioxide (SO2), nitrogen oxides (NOx) and particulate matter (PM).

"We're not dealing with SO2. We're not dealing with NOx. We're not dealing with particulate matter," ***EPA*** air chief William Wehrum told reporters when the ACE plan was released Aug. 21. "We have abundant legal authority to deal with those other pollutants directly, and we have very aggressive programs in place that directly target emissions of those pollutants. So our view is, if we want to regulate PM, we regulate PM straight up. If we want to regulate SO2, we regulate SO2 straight up."

Similarly, Jason Hayes of the conservative Mackinac Center for Public Policy argues in a Sept. 4 op-ed in The Hill that concern about the ACE rule's health risks "fails because it is based in counterfactual speculation about the benefits of a rule that was stayed by the Supreme Court and is not being enforced today."

"To promote the notion that [the CPP] is saving lives today is to engage in fantasy," he adds.

The U.S. Court of Appeals for the District of Columbia Circuit heard marathon oral arguments on the merits of the CPP in September 2016 but has never issued a ruling. It has paused the litigation for a year and a half as Trump officials complete their efforts to revise the regulation.

The CPP briefly took effect when it was finalized in October 2015, though the rule at that point focused only on states developing compliance plans. It would not have imposed GHG limits until 2022.

The high court halted implementation in February 2016 when it issued its stay on a 5-4 vote, an unprecedented move because the lower court had not yet finished its review of the measure. The stay remains in effect.

But the rule technically remains on the books, which CPP supporters argue means it cannot be ignored.

Even ***EPA***'s RIA for the proposal includes the CPP in its "baseline" -- implicitly acknowledging that the rule is part

of the set of current policies from which to judge the ACE rule's effects.

The RIA also includes an "alternative" baseline that looked at "a world without the CPP," arguing that there "may be interest" in this comparison and that including it is consistent with White House guidance on cost-benefit reviews.

Opponents have seized on the 1,400 premature deaths statistic in public messaging against the ACE proposal, arguing that in addition to cutting far fewer GHGs compared with the CPP, it would also harm public health.

The RIA actually includes a range of potential adverse health effects, with the findings varying depending on three "illustrative" compliance scenarios and risk estimates from several epidemiology studies.

The analysis finds that two of the three compliance scenarios would result in between 470-1,400 additional premature deaths in 2030 from increased PM pollution, based on a risk estimate from the so-called "Six Cities" study conducted by Harvard University.

A separate risk estimate based on the so-called "American Cancer Society cohort" results in a premature death increase of 280-550 in the same time period.

Premature deaths related to ozone pollution would increase by as few as eight per year or as many as 230, the analysis finds.

The health impacts are a component of ***EPA***'s broader findings that the ACE proposal's annual "net benefits" would be between $2.3 billion and $6.4 billion lower compared with implementing the CPP standards, when using a 3 percent discount rate.

Cumulatively, the agency finds that its plan would reduce "net benefits" by up to $76 billion through 2037.

Regardless of the particular scenarios, the 1,400 premature deaths figure has gained traction among ACE critics and has been widely reported.

It also appears to be a potent talking point for environmentalists and others who say the Trump administration is shirking its duty to aggressively combat climate change.

For example, an Aug. 28-31 poll of 1,964 registered voters conducted by Politico and Morning Consult found that 45 percent of respondents were more likely to oppose the plan after being told the premature deaths figure, while only 22 percent were more likely to support the policy.

At an Aug. 21 press conference, Senate Democrats and environmentalists repeatedly cited the figure in an effort to boost public opposition to the proposal.

The rule will "knowingly [cause] as many as 1,400 premature deaths. Think about what that means," Georges Benjamin, executive director of the American Public Health Association, said at the event. "We have a public health agency, the ***Environmental Protection Agency***, which is purposefully promoting a plan which they know will kill people. That's medical malpractice. That's public health malpractice."

Benjamin also cited a range of other increased health effects, such as asthma attacks, heart attacks and missed school days, contrasting those harms with Obama administration projections that its CPP rule would improve air pollution-related health across a range of metrics. -- Lee Logan

EPA PROPOSES TO EASE METHANE NSPS, PREVIEWING ADDITIONAL DEREGULATION

Inside EPA | 09/13/2018

EPA's newly released proposal to ease methane limits for new oil and gas equipment is just the first stage of a process that would scuttle direct regulatory limits on the potent greenhouse gas, as Trump officials broadly seek to reduce regulatory burdens imposed on the sector by the prior administration.

EPA's Sept. 11 proposal to soften the 2016 new source performance standards (NSPS) would make several changes, including weakening monitoring requirements for methane leaks, easing schedules for repairing leaks, allowing an exemption for pneumatic pumps at certain greenfield sites, and recognizing compliance with state methane programs as complying with federal rules. Relevant documents are available on InsideEPA.com. (Doc. ID: 215058)

The agency plans to take comment on the plan for 60 days once it is published in the Federal Register.

But the agency indicated -- many observers on both sides of the issue expect -- the new proposal to be a prelude to a future plan that could eliminate methane-specific requirements for oil and gas sources, reverting to a prior approach that explicitly targeted volatile organic compounds (VOCs) and achieved methane reductions as a co-benefit.

The latter approach might effectively bar future methane rules for existing sources under Clean Air Act section 111(d) on the grounds that the statutory language bars regulation for criteria pollutants assumed to be addressed by other Clean Air Act provisions.

The section requires ***EPA*** to regulate existing sources once a sector is covered by an NSPS, though it specifically prohibits such rules if the targeted pollutant in an NSPS is one of six criteria pollutants or is a hazardous air pollutant (HAP).

VOCs are a precursor to ozone, which is a criteria pollutant, while methane is not a criteria pollutant. As such, the law effectively bars such regulation of existing sources.

EPA acknowledges that its proposal could result in additional methane, VOC and HAP emissions from 2019-2025, including 380,000 tons of methane -- equivalent to 8.5 million metric tons of carbon dioxide due to the fact that methane is a much more potent GHG than CO2. The proposal would also result in 100,000 additional tons of VOCs and 3,800 tons of air toxics.

But while ***EPA*** acknowledges the additional VOC emissions "may also degrade air quality and adversely affect health and welfare effects," it does not quantify the VOC-related health harm, citing "data limitations."

EPA does quantify cost savings from the proposal of $484 million from 2019-2025, assuming a 3 percent discount rate, as well as some of the eased requirements, such as semi-annual monitoring at compressor stations.

But the proposal is being criticized by environmentalists who say it will undercut a more-aligned approach developed by the Obama administration.

"Today's proposal is the first step in an apparent two-part strategy to eliminate regulation of oil and gas methane emissions entirely," the Environmental Defense Fund (EDF) says in a Sept. 11 press release.

"If the Administration and its backers are successful, the result will be a hobbled federal framework that would likely reduce oil and gas methane emissions by no more than about 3 percent by 2025 according to EDF's initial analysis," the group adds.

Despite the environmentalists' criticisms, ***EPA*** indicates its plans for a forthcoming proposal, saying in a fact sheet on the just-issued plan that the agency "continues to consider broad policy issues in the 2016 rule, including the regulation of greenhouse gases in the oil and natural gas sectors. These issues will be addressed in a separate proposal at a later date."

Meanwhile, the Bureau of Land Management (BLM) is expected to release a final rule in the coming days that would largely repeal Obama-era rules restricting venting and flaring of methane on public lands. Those rules, which covered existing equipment, were largely aligned with ***EPA***'s NSPS.

EPA's new methane proposal includes several provisions to ease monitoring for methane leaks. They include including relaxing a current requirement to check for leaks every six months and instead requiring operators to check annually. For "low-production wells," operators must conduct monitoring every two years, up from the current annual requirement for those sites.

The proposal would also allow stoppage of monitoring at well sites once all major production and processing equipment is removed.

In addition, the plan floats changing monitoring of emissions from compressor stations to every six months or annually, compared to quarterly under the current rules, while floating separate requirements for stations on the Alaska North slope.

EPA's proposal also extends from 30 to 60 days the amount of time that owners and operators have to complete repairs once leaks are found.

Further, ***EPA***'s plan proposes to allow operators in certain states to follow state requirements for monitoring, repair and recordkeeping in lieu of the NSPS, with some variation across state programs. Specifically, it would allow this equivalency for well sites and compressor stations in California, Colorado, Ohio, and Pennsylvania, and for well sites in Texas and Utah.

Other aspects of the proposed regulation include more flexibility for controlling pneumatic pump-related emissions as well sites, including new language that would allow greenfield sites -- not just existing sites -- to qualify for an exemption from controlling such emissions based on it being technically infeasible to do so.

"This proposal wold avoid the potential of requiring a greenfield site to control the pneumatic pump emissions should it be technically infeasible to do so, while having no impact on the compliance obligation of other greenfield sites that do not have this issue," according to the proposed rule.

While environmentalists panned the proposal, industry supported it. The American Petroleum Institute (API) praised the plan for enabling cost-effective regulation. And in a likely reference to the VOC-focused approach, API says it supports "cost-effective, achievable regulations targeting our mutual objective of reducing emissions of volatile organic compounds that, as a co-benefit, also reduce methane," the group said in a statement.

The issue has split some companies in the sector, however, with larger companies tending to be more comfortable with direct methane controls. ExxonMobil in a Sept. 4 blog post reiterated its call for a "cost-effective federal regulatory standard to manage methane emissions for both new and existing source oil and gas facilities."

An agency press released announcing the proposal also showcased support from the Western Energy Alliance for the proposal, with President Kathleen Sgamma saying it amounts to "fixing a rule that was purposefully designed by the Obama Administration to tie up the American oil and natural gas industry in red tape."

Sgamma in an interview with Inside ***EPA*** says the proposal would help in several ways, including by preventing companies from being locked into a cycle of periodic inspections where "you constantly go back to the same sites" and find no leaks.

She also praises the rule for aligning requirements with states that have rules governing the oil and gas facilities, and downplays the notion that the proposal signals further deregulation.

"These are technical changes to a rule to make it more efficient," she says.

But others, including EDF's Peter Zalzal, cite multiple signs that the ***EPA*** proposal is just the beginning of a deregulatory effort. He tells Inside ***EPA*** that ***EPA*** has states in its regulatory agenda that it would be evaluating the appropriateness of direct regulation of methane, and multiple industry groups have pressed ***EPA*** for a "VOC-only" approach.

Zalzal also called the newly issued ***EPA*** proposal "incredibly damaging," citing in particular its throttling back of leak detection provisions, because leaks can happen at any time. He says the group is still reviewing the proposal's provisions for recognizing state programs as in compliance with the NSPS.

EDF in its formal statement notes that the proposal comes just a few months after a comprehensive study in the journal Science found methane emissions from the U.S. oil and gas industry are 60 percent higher than ***EPA*** reports.

"This amount nearly doubles the near-term climate impact of natural gas and represents the waste of enough natural gas to serve 10 million American homes every year, the group says.

The prospect of a future rule that would weaken or gut ***EPA***'s current methane limits also raises questions about how those regulations will interact with BLM's efforts to scale back its methane rules on public lands. Industry has long charged that BLM's rules are duplicative of ***EPA*** requirements.

However, that argument becomes harder to make if ***EPA*** were to drop methane-specific rules on the sector, thus preventing future rules for existing sources.

But the the consulting firm ClearView Energy Partners in a prior analysis of acting ***EPA*** Administrator Andrew Wheeler's priorities pointed to the possibility that ***EPA*** could narrow -- rather than eliminate -- methane rules, creating regulatory certainty. -- Doug Obey

D.C. CIRCUIT DOUBTS UTILITIES' POWER TO SUE OVER SO2 ATTAINMENT FINDINGS

Inside EPA | 09/13/2018

A three-judge federal appeals court panel at Sept. 11 oral argument doubted whether utilities have standing to sue ***EPA*** over designations for whether areas in Kansas are attaining or violating the agency's sulfur dioxide (SO2) air standard, while signaling some support for environmentalists' challenges to designations for parts of Colorado and Ohio.

At argument in Samuel Masias, et al. v. ***EPA***, et al., U.S. Court of Appeals for the District of Columbia Circuit Judges Patricia Millett, David Tatel and Stephen Williams questioned petitioners and ***EPA*** over how much discretion the agency has when designating areas as attaining or in nonattainment with national ambient air quality standards (NAAQS), including for SO2 and other criteria pollutants. The case consolidates several challenges filed by utilities, environmentalists and others over ***EPA***'s attainment designations for the 2010 NAAQS for SO2, set at 75 parts per billion (ppb) using a novel one-hour averaging time.

Colorado citizens are challenging ***EPA***'s decision to designate the area around a power plant in the state as "unclassifiable," and seek instead a finding of "nonattainment."

EPA's decision is premised on its rejection of meteorological data from nearby Colorado Springs Airport as unrepresentative of wind conditions at the coal-fired power Martin Drake plant. This led the agency to decide it cannot classify the area around the plant, allowing the facility to avoid the tougher control requirements that would flow from being located in a "nonattainment" zone. But local citizens say ***EPA*** often uses the best available data from nearby airports when modeling NAAQS attainment, and the agency's action is inconsistent with prior practice.

Meanwhile, Sierra Club is seeking to shift ***EPA***'s designation of Gallia County, OH, from "unclassifiable" to "nonattainment," claiming that ***EPA*** should have accepted the group's suggestion of a "simple mathematical fix" that would have rendered otherwise flawed state emissions modeling accurate. The state argued for an attainment designation, but ***EPA*** ultimately opted for "unclassifiable," citing data accuracy concerns.

And the Kansas City Board of Public Utilities (BPU) is pressing for ***EPA*** to designate Wyandotte County, KS, as "unclassifiable/attainment," rather than "unclassifiable," a move that BPU claims would provide regulatory certainty that it need not plan for possible additional controls on a Kansas power plant.

Further, the Utility Air Regulatory Group (UARG), representing the power generation sector, has intervened in the suit to defend ***EPA***'s designations from environmentalists' efforts to force more nonattainment designations.

At argument, the judges appeared to doubt the standing of both Kansas City BPU and also UARG to sue. For BPU in particular, judges were very doubtful of material harm that would give the board standing, siding with ***EPA*** on the issue. In effect, there is no regulatory difference between ***EPA***'s designation of "unclassifiable" and Wyandotte County's preferred designation of "unclassifiable/attainment," judges noted.

"Unless there is a real-world difference," then "it is really hard" to grant standing, Williams said.

Attorney Dennis Lane, representing the BPU, claimed that ***EPA***'s designation affords a local power plant far less regulatory certainty than the "unclassifiable/attainment" designation would. But the judges seemed to think this uncertainty was insufficient to provide standing.

Millet and Tatel also pressed attorney Lucinda Langworthy, representing UARG, to provide written evidence of UARG members who have interests in the affected areas of Colorado and Ohio, in order to prove the group has standing.

On the substance of citizens' and environmentalists' claims, Millett appeared most sympathetic to petitioners' claims that ***EPA*** ignored better or corrected data in order to allow areas to escape nonattainment status.

Millett pressed Department of Justice attorney Amanda Berman on why ***EPA*** did not step in and find its own wind data for Colorado Springs, given a substantial federal government presence in the area.

Berman answered that the agency is now using data from a weather station near the Martin Drake plant, which shows very different wind patterns to those found at the airport.

Berman said that ***EPA*** often makes designations based on "best available data," but that the data needs to be good enough, and that was not the case here.

Millett also pressed Berman on ***EPA***'s claim that the "simple mathematical fix" - required to change assumptions about "background" pollution levels -- is in fact very complex.

Berman said that the suggested "fix" is not simple and requires changes to millions of "data points," with the outcome unclear.

Attorney Lisa Perfetto, for Sierra Club, countered that the agency could easily have determined that Gallia County was in "nonattainment" by making the suggested adjustments to its modeling.

Perfetto argued that "***EPA*** is potentially opening up a huge loophole" for states to avoid nonattainment, by allowing states to supply flawed data, then declaring that it cannot designate areas based on that data.

Williams pressed Perfetto on why Sierra Club appears to be "writing off" more-recent emissions data, for the period 2013-2015, that show Gallia County in attainment of the NAAQS.

Perfetto replied that ***EPA*** did not have the data in hand at the time of the designation, and the agency has a duty

to designate under Clean Air Act deadlines using data it has available. If you "wait and wait for data, you delay health benefits indefinitely," she said. -- Stuart Parker

PIPELINE FIRM ASKS HIGH COURT TO SCRAP CWA GROUNDWATER LIABILITY RULING

Inside EPA | 09/13/2018

Pipeline company Kinder Morgan is asking the Supreme Court to overturn a circuit court's decision that held it liable under the Clean Water Act (CWA) for an underground gasoline leak that contaminated surface waters, adding to the push for the high court to decide whether companies can be liable under the water law for groundwater pollution.

Kinder Morgan's Aug. 28 petition for certiorari urged the justices to overturn the U.S. Court of Appeals for the 4th Circuit's decision in Upstate Forever, et al., v. Kinder Morgan Energy Partners, which addressed a 2014 pipeline break in South Carolina. The petition is available on InsideEPA.com. (Doc. ID: 214971)

The case is one in a series of court victories for environmentalists who have sued over pollution that travels through groundwater to lakes, streams and other above-ground waterbodies that the company says "eviscerates" the division between federal and state responsibilities under the CWA.

"The CWA reflects a deliberate choice by Congress to limit direct federal regulation under the statute to point-source discharges into navigable waters, and to leave the regulation of groundwater to the States. The decision below eviscerates that deliberate and fundamental distinction, and indeed embraces the very result Congress explicitly refused to authorize," the petition says.

Kinder Morgan is asking the justices to set a nationwide precedent that groundwater-borne pollution cannot be a "discharge from a point source" subject to CWA penalties, even if it contaminates surface waters that are protected by the law, arguing that the statutory text does not allow for groundwater liability.

"Unsurprisingly, the decision below cannot be squared with the statutory text. The CWA prohibits discharges 'to navigable waters,' not to 'any water with a direct hydrological connection to navigable waters,'" the petition says.

The pipeline firm's request joins an Aug. 27 petition on the same subject that seeks to scrap the 9th Circuit's decision in Hawai'i Wildlife Fund, et al., v. County of Maui. That case deals with underground wastewater injections that travel through groundwater to the Pacific Ocean.

If the Supreme Court takes up either case, it would preempt appellate rulings on a host of other pending citizen suits where environmentalists are seeking CWA penalties for groundwater-borne pollution, ranging from just-filed district court cases in Massachusetts to 6th Circuit appeals that went to oral argument on Aug. 2.

Environmental groups have used those suits to target coal ash disposal sites that they say are contaminating both aquifers and nearby surface waters. They are hoping to use CWA citizen suits against the facilities as an alternative to invoking ***EPA***'s Resource Conservation and Recovery Act (RCRA) rule governing ash disposal, especially given the agency's recent moves to rewrite that rule that environmentalists say will weaken its protections.

Kinder Morgan's petition argues that those tactics show that Upstate Forever and other groups suing over groundwater-borne pollution are actually trying to address site contamination, and thus there is no justification for invoking the CWA instead of RCRA.

"[R]espondents have not invoked the CWA in hopes of requiring Kinder Morgan to obtain a permit. They have invoked the CWA in hopes of getting a federal court to seize control over the ongoing state-supervised remediation of the spill, despite having already exercised their opportunity to provide input into the remediation through the state-provided comment period," the petition says.

Separate from the CWA-groundwater question, Kinder Morgan is also asking the high court to weigh in on what constitutes a "continuing violation" of the water law rather than a wholly past one -- a key question because the CWA only allows citizen suits over continuing violations of the law.

If the 2014 pipeline break is found to be entirely in the past, then Upstate Forever and its allies would be unable to sue regardless of whether the law applies to groundwater.

The 4th Circuit panel that heard the Upstate Forever case split 2-1 on whether the pollution at issue was in fact "continuing," with the majority holding that even though the pipeline has been repaired and is no longer leaking, the fact that spilled gasoline continues to migrate through groundwater into surface waters represents an ongoing violation of the law.

Kinder Morgan urges the high court to reject that logic and instead back the dissenting view, which said that under the CWA, for a violation to be continuing "a point source must currently be involved in the discharging activity by adding, conveying, transporting, or introducing pollutants to navigable waters."

"Allowing citizens to sue for any past discharge as long as they can find some trace of contamination that is still moving into navigable waters would again 'undermine the supplementary role envisioned for the citizen suit.' It would allow citizen suits in situations where government officials are not pursuing remedies, not for any lack of vigilance, but for the rather obvious reason that the discharge has ceased," Kinder Morgan argues, citing the Supreme Court's last decision on the continuing-violation test, 1987's Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation. -- David LaRoss

ORD, LACKING RULE EXPERTISE, LEADS ON SCIENCE PLAN, PROMPTING DOUBTS

Inside EPA | 09/13/2018

EPA has assigned its Office of Research and Development (ORD), an office with little rulemaking experience, to take the lead in rewriting former Administrator Scott Pruitt's controversial plan barring use of studies where the underlying data is not publicly available, a move that is raising doubts about the plan's prospects for completion.

ORD has "never done this before. I think it was given to them because it's a science rule," says one knowledgeable source outside the agency. "They are scratching their heads, 'What do we do with [500,000-plus] comments?'"

While sources say ORD is moving slowly to review the comments and determine how to move forward, assignment of the rule to the office is the latest hurdle the measure faces after Pruitt rushed a draft version of the proposed rulemaking through the agency without following usual review procedures.

The rushed process leading to its release last April -- and the resulting effort to try to back-fill some of the normal regulatory process to develop it as a rule -- are leading to questions about whether the rule will be completed.

Observers are also questioning acting Administrator Andrew Wheeler's interest in advancing the proposal, after Pruitt departed due to a series of ethics scandals.

An ***EPA*** spokesman says ORD "has in-house expertise on rulemaking, including on efficiently responding to public comments. ***EPA*** has started reviewing the more than 597,000 comments received. ***EPA*** will be reviewing these comments through the fall."

The proposed rule generally bars use of research for major rules when the underlying data is not publicly available. But the measure has drawn widespread criticisms, with Democrats, environmentalists, academics and others charging it would be used to bar studies that rely on confidential medical data from being used to justify strict standards.

EPA's own Science Advisory Board (SAB) has raised concerns about the proposal and is seeking to review it.

And even many that may support such an approach have warned that the proposal needs significant work before it can advance. For example, the Defense Department (DOD), often an opponent of ***EPA*** risk analyses that can strengthen cleanups that agency might have to undertake, strongly criticized the plan.

"While we agree that public access to information is very important, we do not believe that failure of [***EPA***] to obtain a publication's underlying data from an author external to the Agency should negate its use," DOD's Aug. 16 comments state, adding, "it is improbable that ***EPA*** will be able to obtain underlying data from all authors, this should not impede the use of otherwise high-quality studies." The comments are available on InsideEPA.com. (Doc. ID: 215033).

EPA rules are typically crafted in draft form by an interagency workgroup of staff through the action development process (ADP), with one office and its representative chairing the workgroup.

The science transparency plan was categorized as a "tier 3" measure, the lowest of three tiers in ***EPA***'s ADP, and therefore received the least scrutiny in the ADP process after it was largely developed by political appointees.

Agency sources told Inside ***EPA*** last spring that the proposal has all the hallmarks of a tier 1 rule that requires significant intra-agency review from career staff and others, usually in a special work group. And without such a work group, they questioned how the agency would be able to review and respond to the thousands of comments the agency is likely to receive on the draft rule.

EPA reversed course after SAB sought to review the plan and upgraded it to tier 1 status.

But one former ***EPA*** source sees reason for concern in delays to SAB's review of the proposed rule, as the number of SAB members selected by Trump ***EPA*** leaders increases.

"SAB doesn't do its own research. It's incumbent on ***EPA*** to conduct the analysis. That could easily take six months to a year or even longer," the source tells Inside ***EPA***. "Therefore there will be at least one additional round of membership rotations before any [SAB] review is finalized."

The source adds that beyond the time it takes ***EPA*** to prepare its report for SAB, it will be "another six months to a year for a panel [to review the proposal and] another six months for the chartered SAB [to review the review]. That means 100 percent of SAB will be Pruitt or Wheeler picks."

"I think it is likely there is a strategy here," the source says. "It certainly plays to a certain constituent group. And even if it doesn't work, it shows that constituent group that this administration is taking this on."

In this case, the lead office for the rule -- the Office of Science Policy -- is within ORD, though sources have been hard-pressed to remember ORD ever taking the lead on a rule before.

EPA's research office is generally responsible for generating scientific information and analyses that support regulatory decisions within ***EPA***'s program and regional offices.

The knowledgeable source adds that the staff workgroup's progress is being "watched very closely" by Brittany Bolen, the associate administrator of the Office of Policy within the administrator's office.

Prior to joining the Trump ***EPA***, Bolen served as GOP counsel to Senate environment committee Republicans. She is among a number of former staffers for Sen. Jim Inhofe (R-OK) to land roles in the Trump ***EPA***.

Agency sources agree that the workgroup is making its way through the 597,030 public comments submitted to the agency's electronic docket on the proposed rule, along with the help of a contractor. As part of the ADP, the workgroup will have to respond to comments, through changes to the draft rule and by crafting a response to comments document that will be released along with any final rule.

Agency sources say that the workgroup's leader is Maria Doa, the former long-time head of the toxics office's chemical control division, who moved to ORD's Office of Science Policy as part of a shuffle of toxics office leadership earlier this year.

As a former toxics official, Doa brings needed regulatory experience to the ORD staff trying to advance the rule, agency sources say. -- Maria Hegstad

Return to Top